163 U.S. 485

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 270.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GRANVILLE J. JAMES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 11, 1893.

(15,389.)

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, A. D. 1893, thereof, begun and holden at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, it being the first day of May, A. D. 1893, before the Hon. Henry C. Caldwell and Hon. Walter H. Sanborn, circuit judges, and Hon. Amos M. Thayer, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fifth day of January, A. D. 1893, there was filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, in pursuance to a writ of error directed to the circuit court of the United States for the southern district of Iowa, a transcript of record in a certain cause wherein The Union Pacific Railway Company was plaintiff in error and Granville J. James defendant in error; which said transcript of record is in the words and figures following, to wit:

2 *Pleas and Proceedings*

in the circuit court of the United — in and for the southern district of Iowa, western division, at Council Bluffs, Iowa, at a term thereof begun and holden on the fourth Monday of September, it being the 26th day of September, A. D. 1892, before the Hon. John S. Woolson, one of the judges of said court.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, western division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between Granville J. James, plaintiff, and The Union Pacific Railway Company, defendant, a manifest error has happened, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid to the United States court of appeals for the eighth circuit, together with this writ, so that you have the same at St. Louis, in the State of Missouri, on the 23 day of January, 1893, in the said circuit court of appeals, to be then and there held; that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of December, 1892.

J. J. STEADMAN,
Clerk of the United States Circuit Court, Southern District of Iowa, Western Division.

Allowed.
JNO. S. WOOLSON, *Judge.*

3 U. S. c. ct. Granville J. James *vs.* U. P. R'y Co. Writ of error. Filed Dec. 11" 1892. J. J. Steadman, clerk.

Indorsed: No. 323. Law. In the circuit court of the United States, southern district of Iowa, western division. Writ of error. Granville J. James *vs.* The Union Pacific R'y Co. Filed Dec. 11, 1892. J. J. Steadman, clerk.

In pursuance of the foregoing writ of error, I, J. J. Steadman, clerk of the circuit court for the southern district of Iowa, western division, do hereby certify and return, full, true and complete transcript of the records, pleading and proceedings concerning the same, in a certain cause, in said court, wherein Granville J. James, *as* plaintiff, and The Union Pacific R'y Co., *as* defendant, I also attach and return herewith, the original citation in said case.

Seal of Circuit Court of the United States, Southern District of Iowa.

In witness whereof, I have hereunto set my hand and affix the seal of said court, at my office in Council Bluffs, this 28" day of Dec. A. D. 1892.

J. J. STEADMAN,
Clerk U. S. Circuit Court, Southern District of Iowa, Western Division.

THE STATE OF IOWA, } ss:
Pottawattamie County, }

Petition.

In the District Court for said County.

GRANVILLE J. JAMES, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO., Defendant.

The said plaintiff, Granville J. James, for cause of action against said defendant, The Union Pacific Railway Company, states that the said defendant is now, and for more than five (5) years past has been a railway corporation, and as such railway corporation has been during said time, operating a line of railway from the city of Council Bluffs, in Iowa, to and through the town of North Bend, in the county of Dodge, and State of Nebraska.

That on the 15" day of July, 1888, and for some time prior thereto, the plaintiff was in the employ of the defendant, in the operation of its said line of railway, as a brakeman on a freight train of said defendant. That at the date aforesaid, and at about

the hour of one o'clock at night, at, or near the town of
3½ North Bend aforesaid, in the State of Nebraska, and on the line of said defendant's railway, the said plaintiff in the course of his employment, and in the performance of his duties, as brakeman, as aforesaid, was required by his said duties as such employé of said defendant, to assist in switching out some freight cars of the defendant from the main track of said railway, on to a side track connecting with said main line of defendant's said railway at said place. That in the performance of his duties, in that regard, it became necessary for the plaintiff at that time and place, to enter between the cars of defendant, for the purpose of making a coupling of the same. That at the place where the side track enters upon, and connects with the main track of said railway, at the place aforesaid, the rails of said side track connecting with the rails of said main track formed a narrow angle or frog which, without being blocked and filled, is extremely dangerous and hazardous, and liable to cause injury to any person walking or stepping upon the same, and that said blocking or filling of the frogs is a sure protection against such danger or injury. That such blocking or filling is, and was at the time of the injuries hereinafter complained of, used and adopted by railway companies generally as the best means of preventing the injuries hereinafter complained of, and removing the danger and hazard attending the same, when not so blocked. That prior to the time of the injury hereinafter complained of, the defendant's roadmaster, who had charge of said line of railway of defendants and side tracks, switches and frogs, including the side track, switch and frog, at the said North Bend aforesaid, and while this plaintiff was in the employ of said defendant, said roadmaster, in order to induce this plaintiff to believe that there was not then, and would not be in the future, any danger or hazard, or liability to injury by stepping upon any of the frogs, connecting any of the side tracks or switches of the main line of defendant's railway, he, the said roadmaster, then and there being a superior officer and employé of said defendant, and having authority to so state, informed this plaintiff, that each and all of the frogs and angles connecting all said tracks and switches with the main line of said defendant's railway for the entire length of the same, were blocked and filled, that this plaintiff, as he had a right to do, fully believed and relied upon the said representative, the said roadmaster, and without any fault or neglect on his part, and without in any manner contributing to the injuries hereinafter complained of, did at the time and place stated, and in performance of his said duties, as employé of said defendant, step between the cars of said defendant, for the purpose of making a coupling of the same, and that a performance of said duties necessitated his stepping upon the angle or frog
4 at that point connecting the side track with the main line, for the purpose of making said coupling.

Plaintiff further states, that he had no knowledge whatever before or at the time he stepped upon said frog or angle, for the purpose of making said coupling, that said frog or angle was not then blocked or filled as stated by said roadmaster as aforesaid. That at

that time it was so dark, it was impossible for any one to see whether said angle or frog had been blocked and filled or not, nor could this plaintiff discover same by the exercise of ordinary diligence, because of such darkness. That in fact, said angle or frog was not then, and had not been, blocked or filled, but was in a very dangerous and hazardous condition by reason of not being blocked or filled, all of which the said defendant then and there knew, but of which said plaintiff had no knowledge whatever. That while said plaintiff was standing upon the tracks of said defendant at the intersection of said side track with the main line of said railway, at the place aforesaid, and by reason of the fact that said angle or frog connecting the said track with the main line was not then filled or blocked, one of plaintiff's feet became so fastened in said frog that he was unable to extricate himself therefrom, and that said defendant negligently caused its engine, which was attached to a train, of which said cars so coupled by said plaintiff were a part, to move said train against and upon said plaintiff and without any fault or negligence upon the part of said plaintiff, but solely by the reason of the negligence of the defendant in failing to properly block said frog as aforesaid, crushed and mangled the foot and left leg of said plaintiff to such an extent that both had to be amputated in order to save the life of said plaintiff, and that by reason of the negligence aforesaid of the said defendant, plaintiff is now and will be for the balance of his life a permanent cripple and unable to earn his livelihood, and that he has been compelled by reason of the acts aforesaid of the said defendant to spend large sums of money for medical attendance, and has been prevented from attending to his business, and has suffered great pain, and that by reason thereof he has been and now is damaged in the sum of twenty thousand ($20,000) dollars.

Wherefore he asks judgment in the sum of twenty thousand ($20,000) dollars and his costs against the said defendant.

GRANVILLE J. JAMES,
By SCOTT & SCOTT AND
F. A. BROGAN.

5 STATE OF NEBRASKA, }
County of Douglas, } ss:

Granville J. James, being duly sworn, on his oath, says that he is the plaintiff above named; that he is a resident of the State of Iowa; that the allegations contained in the foregoing petition are true.

G. J. JAMES.

[SEAL.] Subscribed in my presence, and sworn to before me this 12th day of April, A. D. 1890.

BELLE FINDLEY,
Notary Public.

Indorsed: No. 323. Law. Granville J. James *vs.* Union Pacific R'y Co. Filed Sept. 23, 1890. H. K. Love, clerk.

Answer.

In the District Court in and for Pottawattamie County, Iowa.

GRANVILLE J. JAMES
vs.
THE UNION PACIFIC R'Y CO.

Comes now the defendant in the above-entitled cause, and for answer to the petition of the plaintiff filed herein, states:

That it denies each and every allegation in said petition contained, except such as are hereinafter expressly admitted, or in some other manner controverted.

Defendant admits that it is a corporation organized under and by virtue of the Congress of the United States, and is engaged in the operation of railway in the State of Iowa and other States and Territories of the Union.

Wherefore defendant asks judgment against the plaintiff for costs.

——— ———,
Attorneys for Defendant.

Amendment to Answer.

In the Circuit Court of the United States in and for the Southern District of Iowa, Western Division.

GRANVILLE J. JAMES
vs.
THE UNION PACIFIC R'Y CO.

Comes now the defendant in the above-entitled answer, and files amendment to its answer and states. Defendant admits
6 that the plaintiff was in its employ at the time alleged in the petition, and that he was engaged as a brakeman on a freight train; that he was an old, experienced brakeman; he was familiar with defendant's tracks and side tracks on its line of railway, and especially familiar with defendant's tracks on its line of road near North Bend, where said injury occurred. Defendant avers that it was part of his duties to be familiar with the tracks, side tracks, switches and frogs; that it was part of his duty to assist in switching trains, that is, backing cars out of the regular trains and sending them on side tracks, taking cars from side tracks and putting them in regular trains for transportation; that said plaintiff had often done this work at the station of North Bend, where the said alleged injury occurred, and he had become thereby familiar with the condition of defendant's side tracks, frogs, switches, guard-rails, for a long time prior to this said injury. That the said plaintiff, with full knowledge of the condition of said tracks, frogs and switches, remained in the service of the defendant without any objection or

complaint as to their condition, or any alleged defects therein, and without receiving any promise of any change in respect thereto, and defendant therefore says: That by reason of these facts, the said plaintiff waived any claim for damages or any right of recovery, because of any alleged defects therein, and that plaintiff cannot maintain this suit, or recover in this action, defendant further avers, that if said plaintiff was injured in any manner, or to any extent, it was the result of the usual and ordinary risk, incident to his employment and through his own carelessness and negligence contributing thereto.

WRIGHT & BALDWIN,
Att'ys for Def't.

Indorsed: No. 323. Law. Granville J. James *vs.* Union Pacific R'y Co. Filed Oct. 5, 1890. H. Love, clerk.

Petition for Writ of Error.

In the Circuit Court of the United States in and for the Southern District of Iowa, Western Division.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error.

To the Honorable J. S. Woolson, United States district judge for the southern district of Iowa and presiding judge at the September, 1892, term of said United States circuit court:

Your petitioner, The Union Pacific Railway Company, respectfully states that, at the September, 1892, term of said
7 United States circuit court for the southern district of Iowa, western division, there was tried a case then and there pending wherein said Granville J. James was plaintiff and your petitioner was defendant, in which a verdict and judgment was then and there rendered and entered in favor of said Granville J. James and against your petitioner in the sum of $7,500 and for costs and attorney's fees, and your petitioner filed here within the office of the clerk of said United States circuit court an assignment of errors in said cause, as required by the rules of the United States circuit court *an assignment of error in said cause, as required by the rules of the United States circuit court* of appeals for the eighth circuit, and now here brings it- supersedeas bond in the sum of ten thousand dollars with good and sufficient sureties, conditioned as required by law and the rules of the said United States circuit court of appeals.

Wherefore your petitioner prays that a writ of error be granted directed to the judges of said circuit court of the United States for the southern district of Iowa, western division, commanding that the record in said cause be certified to said United States circuit court of appeals for the eighth circuit, and that a citation issue as

provided by law, and that a stay of proceedings be ordered until said errors shall have been heard and determined.

THE UNION PACIFIC RAILWAY COMPANY;
By JOHN W. BALDWIN, *Its Attorneys.*

A writ of error is hereby allowed as prayed for in the foregoing petition this 6th day of December, 1892.

JOHN S. WOOLSON, *Judge.*

Indorsed: No. 323. Law. Granville J. James *vs.* Union Pacific R'y Co. Filed Dec. 11, 1892. J. J. Steadman, clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Southern District of Iowa, Western Division.

GRANVILLE J. JAMES
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

1. The court erred in overruling the first ground of defendant's motion, to direct a verdict for the defendant as follows, to wit:

8 In his petition, the plaintiff predicates his right to recover upon this one distinct charge of negligence: That the frogs and switches of the defendant were blocked, and that when he entered the service of the company he was so informed by the proper officer thereof, but that the defendant negligently failed to block the frog at the switch in North Bend, at the time this plaintiff was injured, and that without any fault on his part, his foot got caught in said frog and he was injured thereby. It is shown by the evidence that it was the rule of the defendant to have its frogs upon its line of railway blocked, and that generally its frogs were blocked. In order to entitle the plaintiff to recover, it is not only necessary that he should prove that the frog in question was not blocked, but also that the company had knowledge or notice of that fact, or that the company, by the exercise of ordinary care and diligence, could have known that the frog in question was not blocked. There is no proof whatever, in this case, proving or tending to prove, that — company had any notice or knowledge whatever that the frog in question was not blocked. On the contrary, the evidence of the plaintiff tends to show that the frog in question was blocked, but it is claimed that the blocking was insufficient and had been permitted to become worn. There is no claim whatever in this case of negligence upon the part of the company in having the frog blocked and permitting the same to become worn or out of repair. This action is predicated upon the fact that the frog had never been blocked. This being the real status of the case, and there being an entire failure of proof that defendant had any knowledge or notice of such, as is required by law, as to the fact that this frog was not

blocked, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant.

2. The court erred in overruling the second ground of defendant's motion to direct a verdict for defendant, as follows, to wit: The testimony in this case, so far as the plaintiff is concerned, is conflicting as to the question of blocking. Two witnesses only have testified that the frog was not blocked, and another witness for the plaintiff testifies that the frog was blocked, but that the blocking by reason of being worn was insufficient. Upon the part of the defendant, the proof is strong and conclusive, that the frog in question was blocked. Nine witnesses upon the part of the defendant have testified that the frog in question was blocked at the time this accident occurred. The opportunities for the defendant's witnesses to know the condition of the blocking were good, the examinations were careful, and made at the time. With this testimony so preponderating upon the part of the defendant, as to the distinct
9 charge of negligence in this case, it becomes the duty of this court to decide whether the plaintiff has introduced sufficient evidence to support or justify a verdict in his favor.

Conceding to all the evidence offered by the plaintiff, its greatest probative force, in the judgment of the court, it is not sufficient to overcome the strong preponderating evidence offered upon the part of the defendant. If a verdict should be rendered in this case for the plaintiff, it would become the duty of the court, in a conscientious discharge thereof, to set aside the verdict and this being so, there is no necessity of submitting the case to the jury and awaiting its determination. Because, therefore, of the failure on the part of the plaintiff to support his charge of negligence by preponderating testimony, and because of the fact that the testimony offered by the defendant, abundantly overcomes the slight proof made by the plaintiff, your verdict must be for the defendant, and I instruct you accordingly to return one therefor.

3. The court erred in overruling defendant's motion to instruct the jury to return a verdict for the defendant.

4. The court erred in refusing to give to the jury the following instructions asked by the defendant: If the claim of the plaintiff to recover is based upon the fact that the frog in question had been blocked, but, by reason of the negligence of the defendant, it had been permitted to get out of repair there can be no recovery in this case, because there is no proof whatever the length of time the blocking had been getting out of repair, no proof that it had been out of repair any particular length of time, or such a length of time that the defendant ought, by the exercise of ordinary care, to have ascertained the condition of said blocking and repaired the same, and in fact there is a failure upon the part of the plaintiff to prove any of the necessary facts to entitle plaintiff to recover, because of an alleged defective blocking.

5. The court erred in giving to the jury the following instruction:

Thus you are narrowed on this issue to the question, was the frog blocked, or was it not blocked at the time of the injury?

6. The court erred in giving to the jury the following instruction:

There has been some evidence introduced tending to show that this frog was originally well blocked; that is, there is some evidence tending to show that the company had all the frogs in
10 the yard about that switch originally well blocked. Now if defendant had the frog originally well blocked, and put in good condition, and if it is not shown that the frog became unblocked in such a way as that the company would be negligent because of it, the plaintiff cannot recover in this case.

To illustrate further, if evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at a time so near the injury, as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen, or otherwise, before the injury, then in an accident of that kind the company would not be liable for injury to plaintiff, because the company would not have been negligent in not ascertaining that the block had been thus removed. That is, if the frog had been originally well blocked and had, by some sudden accident, become unblocked and an accident occurred, as that to the plaintiff, immediately after the unblocking of the frog or so near to the time, as that the company ought not in the exercise of reasonable care on this point to have found out and discovered before the injury that it had become unblocked, then the company, in such a case, as you will see, would not be negligent and therefore would not be responsible if plaintiff was injured by such frog. This would be a pure accident and included within the risk and hazard he assumed in his contract of employment.

But if on the other hand, in the case I have given you, the company, after this sudden unblocking of the frog, had permitted it to remain unblocked for such a length of time as that the company, exercising ordinary care, ought to have discovered its unblocked condition by inspection or otherwise, then you see the company would have been negligent, and if plaintiff was injured at that frog because of its being thus negligently left unblocked he would be entitled to recover. But there is nothing in this case to show that there was any sudden unblocking of the frog. I have simply given this as an illustration tending to illustrate how negligence of the company might arise in such a case, the evidence does not bring it into this case.

I will give another illustration, which may perhaps assist you in reaching a conclusion as to the truth in this matter. Under some circumstances, it might be that the wearing away of the surface of the block would be such as that the company would become negligent in not ascertaining the wearing away of the block and the dangerous condition into which the frog had come from such
11 wearing and in not replacing it in proper time with an unworn block. But in this suit, which you are now trying, nothing of that kind is in issue. There is no allegation in the pe-

tition that the blocking of the frog had become worn so as to be dangerous, so you will not consider that element, whether the block had become worn or not, which otherwise might have been in this case.

There is no claim before you and you will not consider whether, by wear upon the block, it might have become dangerous, so that the company by allowing it to remain in that condition was negligent.

6. The court erred in giving to the jury the following instruction:

"The question is, was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury, then the plaintiff has not proven his case as his pleadings make it herein, and the defendant is entitled to your verdict. The defendant is not required to prove that the frog was blocked; the burden is upon the plaintiff and he must prove that it was unblocked. Before the plaintiff can have your verdict upon this point, he must sustain the burden of proof and show that the frog was not blocked at the time of the injury."

7. The court erred in entering up judgment upon the verdict for plaintiff and against defendant.

8. The defendant prays and asks for a reversal of the judgment in this case.

WRIGHT & BALDWIN,
Att'ys for Def'ts.

Indorsed: No. 323. Law. Granville J. James *vs.* Union Pacific R'y Co. Filed Dec. 1, 1892. J. J. Steadman, clerk.

THE UNITED STATES OF AMERICA:

The President of the United States to Granville J. James:

You are hereby cited and admonished to be and appear at an United States circuit court of appeals for the eighth circuit, to be holden at St. Louis in the State of Missouri, on the 23rd day of January, 1893, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the southern district of Iowa, western division, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated Dec. *Dec.* 23, 1892.

JNO. S. WOOLSON, *Judge.*

12 Due, timely and legal service of the foregoing citation accepted, and copies thereof acknowledged, this 26th day of December, 1892.

F. A. BROGAN,
HARL & McCABE,
Attorneys for Granville J. James.

U. S. circuit court. No. 323. Law. Union Pacific R'y Co., plaintiff in error, *vs.* Granville J. James, defendant in error. Filed Dec. 28, 1892. J. J. Steadman, clerk.

Bond.

Know all men by these presents—

That the Union Pacific Railway Company, as principal, and T. J. Evans and George F. Wright of Council Bluffs, Iowa, as sureties, hereby acknowledge themselves to be indebted to Granville J. James, in the sum of ten thousand dollars ($10,000), lawful money of the United States, for the payment whereof well and truly to be made unto the said Granville J. James, they bind themselves and their legal representatives, firmly by these presents.

But upon the following conditions: Whereas, the said Union Pacific Railway Company has sued out a writ of error to review the judgment and decisions of the United States circuit court, for the southern district of Iowa, western division, in a case therein pending, wherein the said Granville J. James is plaintiff, and the said Union Pacific Railway Company is defendant.

Now, therefore, if the said Union Pacific Railway Company, plaintiff in error, shall prosecute its writ of error to effect and answer all damages, interest and costs, if it fail to make its said plea good, this obligation to be null and void, otherwise to be and remain in full force and effect.

Signed this 28″ day of November, 1892.

THE UNION PACIFIC RAILWAY COMPANY,
By JOHN N. BALDWIN,
Its Attorney, Principal.
T. J. EVANS,
GEO. F. WRIGHT, *Sureties.*

The foregoing bond is hereby approved by me.

JNO. S. WOOLSON,
U. S. District Judge.

Dated Dec. 1, 1892.

13 STATE OF IOWA, } ss:
Pottawattamie County, }

We, T. J. Evans and George F. Wright, being each first duly sworn, on our oath say, each for himself, that we are one of the sureties named in the foregoing bond, that we are residents of the State of Iowa, that we are each worth, over and above all liabilities, the sum of seven thousand dollars, ($7,000.00) and have property in the State of Iowa, not exempt from execution, of the value of seven thousand dollars ($7,000.00).

T. J. EVANS.
GEO. F. WRIGHT.

Subscribed in my presence, and sworn to before me by the said T. J. Evans and George F. Wright, this 28th day of November, 1892.

[SEAL.]

JOHN N. BALDWIN,
Notary Public.

Indorsed: No. 323. Law. Granville J. James *vs.* Union Pacific R'y Co. Filed Dec. 2, 1892. J. J. Steadman, clerk.

Bill of Exceptions.

In the Circuit Court of the United States for the Southern District of Iowa, Western Division.

GRANVILLE J. JAMES
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } At Law.

Be it remembered, that at the regular September 1892 term of said court, and on the 30" day of September, 1892, the above-entitled action came on for trial, before the Honorable J. S. Woolson, United States district judge of the southern district of Iowa, presiding, and a jury of twelve good and lawful men duly selected, impanelled, accepted and sworn, whereupon the following proceedings were had, and the following evidence was introduced by the parties respectively in the following order, and the following objections and rulings were made and exceptions taken, to wit:

GRANVILLE J. JAMES testified that he was the plaintiff, that he had been engaged as brakeman in the service of the defendant on one of its freight trains, and was injured at North Bend Nebraska on July 15" 1888, at about 1 o'clock a. m. That he was regularly engaged in the discharge of his duties, and while endeavoring to uncouple two cars, his right foot became fastened in an un-
14 blocked switch-frog, and that by holding on to the moving car in front of where he was standing he was able to extricate his foot, but while so doing his left leg was caught by one of the wheels, and crushed above and below the knee, rendering amputation above the knee necessary. That it was customary for the defendant company to block its switch-frogs on the line of its road in Nebraska, and the frogs were generally blocked while plaintiff was in the employ of the defendant, and at the time he entered the employment of the defendant he was informed by the proper representative of the defendant, that the frogs upon its railway were blocked. That he did not know at the time of the accident or at any prior time, that the frog where he was injured was unblocked. The witness identifies a model of a switch-frog in miniature, and explains the use of the different parts. The shoe worn by the plaintiff on his right foot at the time of the accident was examined by him the next morning, and was found to have along the sides of the shoe, marks indicating where it had been caught between the

rails, in the frog of the switch, the shoe was preserved by the plaintiff and turned over to the witness, Annie Kraus. The blocking is to prevent the foot from getting caught in the frog.

The plaintiff called the following witnesses:

A. CRAWFORD, contractor and builder at North Bend, testified that he examined the frog in question during the day following the accident, and his impression was that there was some blocking, but couldn't say positively, whether it was blocked or not. There was no blood near the frog, but there was blood on the rails, about 30 feet west of the frog, and marks in the dust from the frog to the rails, where the blood was as if something had been dragged from the frog to the latter rails.

A. S. DAY, a butcher at North Bend, testified that he was awakened about 1 o'clock in the morning of July 15, 1888, by the cries of the plaintiff and hurried to the scene of the accident; helped to carry the plaintiff to the doctor's house and remained up with him all night; was told by the plaintiff the manner in which the accident occurred, and went early in the morning to examine the frog in question; it was not blocked, and there was no blocking or pieces of blocking near it; there were marks in the dust between the rails from the frog to a point 20 to 40 feet west of the frog where the blood was found on the rails.

CLARK DODGE: Worked in the elevator at North Bend; examined the frog the next morning after the accident and there was no wedge or block in the frog.

15 Dr. A. B. ELLWOOD, physician and surgeon at North Bend: Was called to the depot at North Bend about one o'clock on the morning of July 15, 1888; saw the plaintiff with his leg injured and amputated the left leg; the amputation was necessary to prevent his bleeding to death and to save his life; remained up with him all night and went to the place of the injury at daybreak in the morning after hearing his statement of how he was injured; examined the frog in question, and found that it was not blocked, and that a person wearing an ordinary shoe could very easily get his foot wedged or fastened in the frog; there were marks in the dust between the rails from the frog to the place where the blood was found on the rails west of the frog.

WM. L. SIRLES, engaged in the operation of railroads for twelve years as brakeman and switchman: Was in the employ of the defendant company at the time of the accident; was in Omaha Sunday morning, July 15, 1888, but was sent to North Bend in the afternoon of that day to nurse and take care of James; went to the place of the accident and examined the frog in question; there was at that time some blocking in the frog, but it was the same as no blocking at all; it was only about half thick enough; it was a common inch board nailed into the frog.

Witness has been in the employ of the Missouri Pacific Railway Company and the Union Pacific Railway Company, and has railroaded for 12 years; it is customary on all railroads that I have worked for to block the switch-frogs; the blocking is a device to prevent men walking on them from getting caught in the frog; the blocking does not in any way interfere with the operation of the road by the engines and cars; the blocking consists of a wooden wedge, three and one-half to four inches thick, and from eighteen inches to three feet long, depending on the kind of frog.

Mrs. ANNIE KRAUS testified that she was a clerk in the law office of F. A. Brogan; that the plaintiff delivered to her the shoe worn by him at the time of the accident; that there were marks along the sides of the shoe as if it had been caught in a vice; the shoe remained in the office when she left it.

THOMAS S. BRODERICK testified that he saw the shoe in question; that there were some marks on the sides of it; that it was lost by being accidentally thrown into a heap of rubbish, and taken away by the janitor.

RICHARD O'KEEFE testified that he was in the employ of the defendant, as track foreman Omaha and South Omaha, for
16 seventeen years, up to *to* the year 1885; that prior to and in the year 1885, it was the custom of the defendant company to block its frogs.

The blocking consisted of wooden wedges cut out for the purpose by machinery, and were three and one-half to four inches thick, and from eighteen inches to three feet long; that the unblocked switch-frog was dangerous by reason of employés getting their feet caught in them; that the blocking was a device to render the frogs safe, and that the use of the blocking made the frogs safer; that he had heard of blocking being used on Eastern roads prior to its introduction in the West.

Plaintiff then rested. Defendant, to sustain the issues on its part, introduced the following testimony:

JOHN GILLIS, a section foreman, testified that he was in charge of the section at North Bend, where the accident happened; it was his duty to keep the frogs blocked; that he examined the frog the next morning after the accident happened, and it was all blocked and in good condition; that the blocking in it the Sunday morning after the accident was the same blocking that he had put in there before; that the blocks in the frogs may get out of place by being taken out by the workmen when the tracks were changed, but when that is not done, the ordinary way in which the blocks get out of place is by being torn or cut loose by the flange of the wheel, and in that case, the pieces or the blocking are found remaining between the rails.

GEORGE MILLER, worked in section under Gillis, examined the switch and frog the next morning after the accident at North Bend,

and the frog in question was blocked and in good condition; that the blocking in the frog at the switch in question, and where James was hurt, was the same blocking that has been in there for some time; the nails in the blocking were rusty; when frogs are properly blocked, the blocking is sufficient to prevent a man from getting his foot caught; witness did not assist in putting any blocks in the frog in question at any time before the accident.

MICHAEL RYAN, assistant roadmaster of the defendant, examined the entire line of defendant company from Grand Island to Omaha, stopping only at important towns; examined the frog in question; had not heard of any accident; the frog was properly blocked, and in good condition.

C. R. OGILBE, coal and implement dealer at North Bend, examined the frog and switch in question the next morning after the accident, and the frog was blocked and in good condition.

17 B. F. DUNN, agent of the defendant at North Bend, examined the frog and switch in question, where James was hurt, the next morning after the accident, and the frog was properly blocked and in good condition.

Mr. WILLIAMS: Was night operator of the company at North Bend at the time James was hurt; examined the switch and frog at North Bend in question where James was hurt the next morning after the accident, and the frog was properly blocked and in good condition.

C. E. AMSBERRY: Was conductor of the freight train on which James was brakeman at the time he was hurt; was at North Bend the Monday or Tuesday following the accident, and examined the frog in question and where James was hurt, and it was properly blocked and in good condition.

The foregoing was all the evidence introduced or offered to be introduced by either party on the trial of said cause.

At the close of all the testimony, and on the 3" day of October, 1892, the defendant filed a motion to direct a verdict for the defendant, in words and figures following:

1. In his petition, the plaintiff predicates his right to recover upon this one distinct charge of negligence. That the frogs and switches of the defendant were blocked, and that when he entered the service of the company he was so informed by the proper officer thereof, but that the defendant negligently failed to block the frog at the switch in North Bend at the time this plaintiff was injured, and that without any fault on his part, his foot got caught in said frog and he was injured thereby. It is shown by the evidence that it was the rule of the defendant to have its frogs, upon its line of railway, blocked, and that generally its frogs were blocked. In order to entitle the plaintiff to recover it is not only necessary that he should prove that the frog in question was not blocked, but also that the company had knowledge or notice of that fact, or that the company, by the exercise of ordinary care and diligence, could

have known that the frog in question was not blocked. There is no proof whatever in this case proving, or tending to prove that — company had any notice or knowledge whatever that the frog in question was not blocked. On the contrary, the evidence of the plaintiff tends to show that the frog in question was blocked, but it is claimed that the blocking was insufficient and had been permitted to become worn. There is no claim whatever, in this case, of negligence upon the part of the company in having the frog blocked and permitting the same to become worn or out of repair.

18 This action is predicated upon the fact that the frog had never been blocked. This being the real status of the case, and there being an entire failure of proof that defendant had any knowledge or notice, such as is required by law, as to the fact that this frog was not blocked, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant.

2. The testimony in this case, so far as the plaintiff is concerned, is conflicting as to the question of blocking. Three witnesses only, have testified that the frog in question was not blocked, and another witness for the plaintiff has testified that the frog was blocked, but that the blocking, by reason of being worn, was insufficient.

Upon the part of the defendant, the proof is strong and conclusive, that the frog in question was blocked. Seven witnesses upon the part of the defendant, have testified that the frog in question was blocked at the time this accident occurred. The opportunities for the defendant's witnesses to know the condition of the blocking were good, the examinations were careful and made at the time. With this testimony so preponderating upon the part of the defendant, as to the distinct charge of negligence in this case, it becomes the duty of this court to decide whether the plaintiff has introduced sufficient evidence to support or justify a verdict in his favor.

Conceding to all the evidence offered by the plaintiff, its greatest probative force, in the judgment of the court it is not sufficient to overcome the strong preponderating evidence offered upon the part of the defendant. If a verdict should be rendered in this case for the plaintiff, it would become the duty of the court, in a conscientious discharge thereof, to set aside the verdict and this being so, there is no necessity of submitting the case to the jury and awaiting its determination. Because therefore, of the failure upon the part of the plaintiff to support his charge of negligence by preponderating testimony, and because of the fact that the testimony offered by the defendant abundantly overcomes the slight proof made by the plaintiff, your verdict must be for the defendant and I instruct you accordingly to return one therefor, and upon the same the court overruled said motion on each ground thereof, to which rulings and each of them, the defendant at the time duly excepted. Thereupon the defendant requested the court to give the jury the following instruction:

Instruction No. 1. If the claim of the plaintiff to recover is based upon the fact that the frog in question had been blocked, but by

reason of the negligence of the defendant, it had been per-
19 mitted to get out of repair, there can be no recovery in this case, because there is no proof whatever the length of time the blocking had been getting out of repair, no proof that it had been out of repair any particular length of time, or such a length of time that the defendant ought, by the exercise of ordinary care, to have ascertained the condition of said blocking, and repaired the same, and in fact there is a failure upon the part of the plaintiff to prove any of the necessary facts to entitle plaintiff to recover because of an alleged defective blocking.

Which instruction was refused by the court, and the same was not given to the jury, and to which ruling the defendant at the time duly excepted and after the conclusion of the evidence and argument of counsel, the court upon its own motion instructed the jury as hereinafter set out in full, which entire charge is made a part of the record, and which contained as there shown, among other things, as follows:

"Thus you are narrowed on this issue to the question, was the frog blocked or was it not blocked, at the time of the injury? To which charge and instruction the defendant at the time duly excepted, and the court upon its own motion, further charged the jury as follows:

There has been some evidence introduced tending to show that this frog was originally well blocked, that is, there is some evidence tending to show that the company had all the frogs in the yard about that switch originally well blocked.

Now if the defendant had the frog originally well blocked and put in good condition, and if it is shown that the frog became unblocked in such a way as that the company would be negligent because of it, the plaintiff cannot recover in this case.

To illustrate farther: If evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at the time so near the injury, as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen or otherwise, before the injury, then in an accident of that kind, the company would not be liable for the injury to plaintiff, because the company would not have been negligent in not ascertaining that the block had been thus removed.

That is, if the frog had been originally well blocked, and had, by
some sudden accident, become unblocked and an accident oc-
20 curred, as that to the plaintiff, immediately after the unblocking of the frog, or so near to the time as that the company ought not in the exercise of reasonable care on this point, to have found out and discovered before the injury that it had become unblocked, then the company, in such a case, as you will see, would not be negligent, and therefore would not be responsible if plaintiff was injured by such a frog. This would be a pure accident and included within the risk and hazard he assumed in his contract of employment.

But if, on the other hand, in the case I have given you, the company, after this sudden unblocking of the frog, had permitted it to remain unblocked for such a length of time as that the company, exercising ordinary care, ought to have discovered its unblocked condition by inspection, or otherwise, then you see the company would have been negligent, and if plaintiff was injured at that frog because of its being thus negligently left unblocked, he would be entitled to recover. But there is nothing in this case to show that there was any sudden unblocking of the frog. I have simply given this as an illustration tending to illustrate how negligence of the company might arise in such a case, the evidence does not bring it into this case.

I will give another illustration, which may perhaps assist you in reaching a conclusion as to the truth in this matter. Under some circumstances it might be that the wearing away of the surface of the block would be such as that the company would become negligent in not ascertaining the wearing away of the block, and the dangerous condition into which the frog had come from such wearing, and in not replacing it in proper time with an unworn block.

But in this suit, which you are now trying, nothing of that kind is in issue, there is no allegation in the petition that the blocking of the frog had become worn so as to be dangerous, so you will not consider that element whether the block had become worn or not, which otherwise might have been in this case.

There is no claim before you and you will not consider whether, by wear upon the block, it might have become dangerous, so that the company by allowing it to remain in that condition was negligent.

To which instruction and charge the defendant at the time duly excepted.

And the court among other things, and on its own motion, charged the jury as follows:

"The question is, was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury then
21 the plaintiff has not proven his case as the pleadings make it herein, and the defendant is entitled to your verdict. The defendant is not required to prove that the frog was blocked, the burden is upon the plaintiff, and he must prove that it was unblocked. Before the plaintiff can have your verdict upon that point, he must sustain the burden of proof, and show that the frog was not blocked at the time of the injury."

To which instruction and charge the defendant at the time duly excepted.

The following is the entire charge in full as given by the court, and it is hereby made a part of the record:

GENTLEMEN: The plaintiff, Granville J. James, claims of the defendant, The Union Pacific Railway Company, twenty thousand dollars as damages for injuries, which he alleges he sustained on the 15th day of July, 1888, by reason of the negligence of the defendant. The issues upon which this question of negligence is to be tried

and your decision rendered, are not complicated, as the negligence complained of arises, according to the claim made, and as counsel upon either side have stated before you, solely because of the alleged condition of a frog in the line of the defendant's road at North Bend, Nebraska, at the time when the alleged injury was suffered by the plaintiff, the plaintiff claims that because the frog was not blocked he received his injury. Now in order to recover the plaintiff must prove, by a fair preponderance of the evidence, that the frog was not blocked, and also, that because of its not being blocked, the injury occurred to plaintiff. You are to decide this case upon the evidence introduced and the law as now stated to you by the court, which is to be taken by you as the law applicable to the case, and your verdict must be based on the evidence introduced upon the trial of this case, applying to it the law as given you by the court.

The defendant denies the negligence charged, and this throws upon the plaintiff the burden of proving that the negligence actually occurred, and that the injury to plaintiff was caused thereby. In other words, that the negligence of defendant actually existed, and that such negligence was, as I shall presently define that term to you, the proximate cause of plaintiff's injury.

Unless you do find, by a fair preponderance of the evidence, that this negligence of the defendant as claimed, actually existed, and that plaintiff was injured directly or efficiently, as the result of that negligence, you cannot find for the plaintiff.

22 There are certain facts conceded in this case and not in dispute, viz: that plaintiff, in July, 1888, was in the employ of the defendant company as a brakeman, and that, in the line of his duty at that time, at North Bend, Nebraska, he went between the cars of the defendant company, in reference to which he was then employed, and was injured. These facts are not in dispute. The defendant claims that the frog in question was blocked; that is its contention in the matter. Thus you are narrowed on this issue to the question, was the frog blocked or was it not blocked at the time of the injury?

You must take all of the testimony on this point that has been introduced and give it your full and fair consideration; take the characters of the witnesses who have testified concerning it, whether they are interested in the suit, the consistency or inconsistency of their statements, whether they are corroborated or contradicted by the testimony of other credible witnesses, their means of investigating or examining the fact, and how accurately or thoroughly the- did investigate and examine it, and how they knew what they were testifying to on this point. If the frog was blocked at the time of the accident, then, under the claim made in the petition of plaintiff, he cannot recover, for his claim of negligence is not sustained, if you find the frog was blocked, for the injury to plaintiff must flow from the negligence of the defendant; the negligence of the defendant must be what is termed the "proximate cause" of the injury, that is, the negligence must be the direct or efficient cause of the injury which flowed from it.

Now, it is not every accident which occurs to a railway employé for which the railway company is liable. Many injuries which occur are in their nature accidental, and the company can only be made liable for such injuries as the evidence shall show are caused by the negligence of the company. By the term "negligence" I mean the doing of something, which, under the circumstances, a man, exercising ordinary care and prudence, would not do, or failing to do something, which, under the circumstances, a man exercising ordinary care and prudence should have done.

The law imposes upon a railway company the duty and obligation of furnishing for its employés in its service, reasonably safe appliances to work with and about, that is, the company must, on its part, exercise ordinary care for the safety of its employés, in the performance of their duties.

A railway company may not negligently permit its frogs to remain unblocked where its employés are called upon to pass in
23 the performance of their duties, without adequately responding in damages, whenever an employé, exercising proper care on his part, is injured, because of such negligence, on the part of the company, while in the performance of his duty.

Now as to whether or not, this negligence occurred, you are to find from the evidence. You are to take all of the evidence introduced, on that point, and then determine whether plaintiff has or has not fulfilled the burden of proof which is upon him to sustain his case, as I have defined it to you, by proving to your satisfaction that the frog was not blocked. While it is the duty of the railway company to exercise ordinary care in furnishing its employés with reasonably safe appliances, with and about which to work in the performance of their duties, yet there is a risk and hazard, which every person who enters upon railway service, necessarily and voluntarily assumes, and takes upon himself. But the railway company may not, with impunity, demand of those in its service, that they perform their duties under any hazard and risk to themselves beyond that which, with the exercise of ordinary care on the part of the railway company, pertains to and inheres in the employment in which the employé is engaged; but the employé himself, as well must exercise ordinary care on his part in the performance of his duties.

There has been no evidence introduced in this case tending to throw upon the plaintiff what is called "contributory negligence," that is, to show that he, himself, was not careful. The evidence does not show in any respect that the plaintiff was negligent himself, so that if the company was negligent he yet might not recover. Therefore, the negligence, if any, in this case, is simply that alleged against the company, whether the company was, or was not negligent. When a person enters upon any employment, he assumes the risks, hazards and dangers pertaining to that particular business when it is carried on in a proper and careful manner. In this case the business which plaintiff entered upon in his contract of employment with the defendant was that of railroading. It is well known that this business of railroading, is attended with hazard and

danger, that it is attended even when carefully and properly carried on by the railway company with risks, hazards and dangers, and persons employed therein are of necessity subjected to much greater risk, hazard and danger, than pertains to the usual and ordinary avocations of life. Therefore, the law recognizes and holds that a person who enters upon this hazardous employment assumes and takes upon himself all the risks, hazards and dangers, no matter how great, they may be, which grow out of and pertain to this employment, when properly carried on, *i. e.* when carried on by
24 the company with the exercise of ordinary care on its part, and any injury which may befall the employé when the business is thus carefully carried on by the company, the employé and not the company is compelled to bear. But the employé does not assume the risk and hazard which may be caused by the negligence of the company; he does not contract to assume this risk, and whenever the company, by its negligence, compels its employés to labor with or about unsafe or dangerous appliances, when there are reasonably safe appliances in general use, which the company might reasonably have given him about which to be employed, then the employé is not called upon to assume the risk and hazard resulting from the use of these dangerous and hazardous appliances. There is no claim in this case that the plaintiff had knowledge of this particular frog being unblocked, if such was the fact under the evidence. The plaintiff went in between the cars in the line of his duty. So far as the evidence shows he was not negligent in so doing, and there is no testimony showing that he performed his duty in a negligent manner. The frog is not charged to be an improper frog, that is the iron of the frog. The frog proper is not claimed to have been other than a proper frog to be used in the place in the track where this frog was used.

There has been some evidence introduced tending to show that this frog was originally well blocked, that is, there is some evidence tending to show that the company had all the frogs in the yard about that switch originally well blocked.

Now, if defendant had the frog originally well blocked and put in good condition, and if it is not shown that the frog became unblocked in such a way as that the company would be negligent because of it, the plaintiff cannot recover in this case. To illustrate further: If evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog, or blocking, had been pulled out of the frog at a time so near the injury as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen or otherwise before the injury, then in an accident of that kind the company would not be liable for the injury to plaintiff, because the company would not have been negligent in not ascertaining that the block had been thus removed. That is, if the frog had been originally well blocked, and had by some sudden accident become unblocked, and an accident occurred as that to plaintiff immediately after the unblocking of the frog, or

so near to the time as that the company ought not, in the
25 exercise of reasonable care on this point, to have found out and discovered before the injury that it had become unblocked, then the company, in such a case, as you will see, would not be negligent and therefore would not be responsible if plaintiff was injured by such frog. This would be a pure accident and included within the risk and hazard he assumed in his contract of employment.

But if, on the other hand, in the case I have given you, the company, after this sudden unblocking of the frog had permitted it to remain unblocked for such a length of time, as that the company, exercising ordinary care, ought to have discovered its unlocked condition by inspection or otherwise, then you see the company would have been negligent, and if plaintiff was injured at that frog, because of its being thus negligently left unblocked, he would be entitled to recover; but there is nothing in this case to show that there was any sudden unblocking of the frog; I have simply given this as an illustration, tending to illustrate how negligence of the company might arise in such a case; the evidence does not bring it into this case; I will give another illustration, which may, perhaps, assist you in reaching a conclusion as to the truth in this matter; under some circumstances it might be that the wearing away of the surface of the block would be such as that the company would become negligent in not ascertaining the wearing away of the block and the dangerous condition into which the frog had come from such wearing, and in not replacing it in proper time with an unworn block; but in this suit, which you are now trying, nothing of that kind is in issue; there is no allegation in the petition that the blocking of the frog had become worn so as to be dangerous, so you will not consider that element, whether the block had become worn or not, which otherwise might have been in this case.

There is no claim before you, and you will not consider whether by wear upon the block it might have become dangerous, so that the company, by allowing it to remain in that condition, was negligent.

The question is, Was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury, then the plaintiff has not proven his case as his pleadings make it herein, and the defendant is entitled to your verdict; the defendant is not required to prove that the frog was blocked; the burden is upon the plaintiff, and he must prove that it was unblocked.

Before the plaintiff can have your verdict upon that point, he must sustain the burden of proof, and show that the frog was not blocked at the time of the injury.

26 By the burden of proof, I mean the duty or obligation of proving the fact, that is, in this case the testimony as to the condition of the frog at the time of the injury, when weighed by you as to the credibility and the amount of credible testimony, must be in favor of plaintiff's contention, which is, that the frog was not blocked at the time of the injury. When you take the testimony and place it in the scales of your judgment, to determine which

side preponderates, that of plaintiff or defendant on this point; if you do not find that the credible weight is with the plaintiff, then you must find a verdict for the defendant. If, however, it is proven to your satisfaction by a fair preponderance of the evidence, that the frog at that time and place was unblocked, then the question remains, did this unblocked condition of the frog cause plaintiff's injury?

You will notice that unless you find that the frog was unblocked, the case ends right there, for you cannot consider the question as to whether the unblocked frog was the cause of plaintiff's injury, until you have found that the frog was in fact unblocked. The pleadings in this case assume, and it has been conceded in argument before you by plaintiff's counsel, that if the frog was properly blocked, it could not have caused plaintiff's injury.

I ought to say to you, I think, gentlemen, that the law does not compel the defendant company to prove to you exactly how it was plaintiff was hurt, nor that the plaintiff received his injury from some other cause than the frog being unblocked. The company had a right, under the pleadings in this case, to limit its evidences to the attempt to show that the frog was blocked at the time of the injury, and if you find that it was blocked, upon the whole evidence, you will pursue the matter no farther. But if you shall find that the frog was not blocked, then you will proceed to consider whether because of such unblocked condition plaintiff, in the exercise of his duty, was injured by the train of the defendant running upon him.

If you find both these points for the plaintiff, then he is entitled to your verdict, in such an amount as you may find under the instructions of the court is an adequate compensation to him for his injury.

You will notice, gentlemen, I use the term "compensation." In a case of this kind, if the plaintiff is entitled to recover, he is entitled to recover only for compensation, there can be no verdict given in this case, as the law authorizes in some cases, wherein the
27 element of punishment arises, under the law you cannot punish the defendant for not blocking the frog—*i. e.*, give money to plaintiff beyond actual compensation.

All you can do in this case, if you find for the plaintiff, is to compensate him. Now that compensation includes (so far as you can reduce it to dollars and cents in your verdict) the pain and suffering which he endured at the time of the accident, and following the accident, and up to the present time, and any pain and suffering which may come to him in the future by reason of his injury. I believe, however, that there is no testimony in this case as to any future pain and suffering and that passes out of the case, and will not be considered by you.

Further, you will take into consideration the element of loss to him for the time in which he was entirely disabled, because of his being in the process of recovery from the wound and amputation. Then take, from that time on, the element of loss which will result to him, *i. e.* the loss which has already, and which will in the future

result to him, from the disability under which he is laboring because of the injury or loss of his leg, for the testimony shows it was amputated, and that amputation was necessary in order to save his life.

You will see, gentlemen, that these elements of compensation, as I have shown them, represent in dollars and cents, the amount which will make him whole for the suffering which he has endured, and for the disability as to earning his living, which he is laboring under, and will labor under because of the effect of the injury, which is the loss of his leg.

You will also remember, gentlemen, that human life is uncertain. The plaintiff may not live a year from this time and he may live many years. If he had not received this injury he might in some other way have lost his life before the present hour; so you must take into consideration the uncertain element of human life. You cannot take the amount which he could have earned in a year and multiply that by any given number of years and say that is the amount he should receive. If it were a question of damages growing out of loss of grain or stock you would have the market value to rely upon. All you can do in this case is to attempt to place what in your judgment is a reasonable compensation to the plaintiff under all the circumstances of the case.

You will take into consideration also, gentlemen, that whatever is awarded him comes to him now in lump and is placed
28 beyond all the uncertainties of human life; he gets it now, and has the advantage of the full amount from the time it is awarded.

When you have considered all these elements, if you find for the plaintiff then you will return your verdict for such an amount as you believe is a fair and reasonable compensation for the injury he has received.

If you find for the defendant, under the instructions I have given you, then you will simply return your verdict for the defendant. If you find for the plaintiff it will be necessary to include in your verdict the amount at which you assess his damages, and for this purpose I will hand you two forms of verdict. Gentlemen, you may retire.

By agreement of parties the court took the motion for new trial under consideration, and the court agreed that the defendant should have sixty days from October 31, 1892, within which to file, settle and allow a bill of exceptions. To the end, therefore, that the matters hereinbefore set forth may be made of record in said court the defendant, within the said sixty days by the court allowed, as aforesaid, brings this, its bill of exceptions, and asks that the same may be allowed and made of record, which is accordingly done, this 21st day of November, 1892, the same being one of the days of the September, 1892, term of said court.

JNO. S. WOOLSON, *Judge.*

Nov. 21, 1892.

I have examined the above and foregoing bill of exceptions and find that the same is correct so far as abstract of evidence is concerned. Have not compared the instructions, but have no doubt they are correct copies.

F. A. BROGAN,
Attorney for Plaintiff.

Indorsed: No. 323. Law. Granville J. James *vs.* The Union Pacific R'y Co. Filed Dec. 2, 1892. J. J. Steadman, clerk.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Iowa, }

Be it remembered that at a term of the circuit court within and for the southern district of Iowa aforesaid, begun and holden at the Government building, in the city of Council Bluffs, on the 4″ Monday of September, A. D. 1890, to wit, on the 22″ day of September, A. D. 1890, Hon. O. P. Shiras, judge of said court in and for
29 the southern district of Iowa, presiding, on the 2″ day of said term, it being the 23″ day of September, A. D. 1890, among others the following proceedings were had, done and entered of record, to wit:

Cost Bond.

GRANVILLE J. JAMES }
vs. } 323.
UNION PACIFIC R'Y CO. }

Now upon this day *this day* this cause coming on to be heard upon the motion of the defendant that the plaintiff be required to file a cost bond herein, and the court having heard and considered the same, orders and directs that the plaintiff be and is hereby required to file a cost bond within sixty days.

Afterwards, on the same day, the following was made of record, to wit:

GRANVILLE J. JAMES }
vs. } 323.
U. P. R'Y CO. }

Continued.

It is by the court ordered and directed that the cause be and the same is hereby continued to the March term, 1891, of this court.

On Thursday, March 26th, A. D. 1891, the following proceedings were had, done and entered of record, to wit:

GRANVILLE J. JAMES
vs.
U. P. R'Y Co. } 323.

Continued.

It is by the court ordered and directed that this cause be and the same is hereby continued to the September term, A. D. 1891, of this court.

On Monday, Oct. 5, A. D. 1891, the following proceedings were had, done and entered of record, to wit:

GRANVILLE J. JAMES
vs.
U. P. R'Y Co. } 323.

Continued.

It is by the court ordered and directed that this cause be and the same is hereby continued to the March term, A. D. 1892, of this court.

30 On Saturday, April 9", A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Trial by Jury Commenced; Jury Impaneled.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y Co.

Now on this day, this cause coming on to be heard, and the parties being present, and ready, here comes a jury of twelve good and lawful men, to wit:

W. H. Mohr,	John Noon,
T. J. Bentley,	J. O. Braman,
John Holden,	Paul White,
W. S. McClusky,	E. P. Brown,
J. W. Paul,	Geo. Copp,
D. Cooper,	S. S. Morrow,

who were duly impaneled and sworn, well and truly, to try the issues joined between the parties, and a true verdict render, according to the evidence and the law, as given them by the court.

Pending proceedings, the jury were permitted to separate until tomorrow at ten o'clock a. m.

Afterwards, on April 11, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Motion to Suppress Deposition Overruled.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, came the defendant, by its attorneys, and moves in open court for the suppression of the deposition of A. B. Elwood, taken and filed in behalf of the plaintiff, and the same having been fully argued and submitted, and the court being fully advised in the premises, orders and directs that said motion be, and it is hereby, overruled, and thereupon, the defendant at the time, and in open court, duly excepted to said ruling.

Afterwards, on the same day, the following proceedings were had, done and entered of record, to wit:

31 *Instructions Refused.*

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, after the introduction of the evidence herein, came the defendant, by its attorneys, and moves the court to give to the jury certain instructions, which are in writing, and filed by said defendant, and the court having heard and considered said motion, and carefully examined said instructions, overrules said motion, and refuses to give said instructions, to which ruling the defendant at the time, and in open court, duly excepted.

On the same day April 11, A. D. 1892, the following proceedings, were had, done and entered of record, to wit:

Trial Resumed; Cause Submitted; Jury Retire.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, the parties being present, together with the jury herein, the trial of this cause was resumed, and jury having heard the evidence introduced, the arguments of counsel and the instructions of the court, retire under charge of a sworn officer of the court to deliberate upon their verdict.

Now on this 12th day of April, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Jury Discharged.

GRANVILLE JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day came the parties hereto by their respective attorneys and thereupon came the jury herein and it having been made to appear to the satisfaction of the court that the jury had been in deliberation for twenty-four hours and the jurors had not been able to arrive upon a verdict herein, and thereupon the foreman in the presence of the jurors announced to the court that the jurors were unable to arrive at a verdict, and the court being now fully advised in the premises orders and directs that the jury be and it is hereby discharged and this cause be and it is hereby continued.

On September 30, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

32 *Jury Impaneled.*

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, this cause coming on to be heard, and the parties being present and ready, here comes a jury of twelve good and lawful men, to wit:

John Mann,	J. W. Garmong,
M. H. Byers,	Joseph Boardman,
Wm. J. Walker,	Ed. Fish,
Geo. T. Miller,	John T. Bryson.
W. F. Evans,	H. M. Huff,
Samuel Rowley,	F. Florencourt,

who were duly impaneled and sworn, well and truly to try the issues joined, between the parties, and a true verdict render, according to law and evidence as given by the court.

On Oct. 1, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Trial Resumed.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, the parties being present, together with the jury, the trial of this cause is resumed.

Pending proceedings, the jury were permitted to separate until tomorrow morning, at ten o'clock.

On Oct. 3, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Jury Charged.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day, after the introduction of the evidence herein, came the defendant, by its attorneys, and moves the court to give to the jury certain instructions, which are in writing, and filed by said defendant, and the court having heard and considered said motion (and which said order shall direct the jury to return a verdict for and in behalf of defendant) and being now fully advised in the premises, overrules said motion, to which ruling the defendant at the time and in open court excepts.

33 Jury is charged, and each party at the time excepts to the instructions as given, and to the refusal of the court to give the instructions asked, and the defendant at the time and in open court excepts to the charge of the court.

Whereupon, the jury retire under the charge of a sworn officer to deliberate upon their verdict. Afterwards, on the same day, the jury return into open court with this their verdict, as follows, to wit:

Verdict.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

We the jury, find for the plaintiff, and assess his damages at $7,500.

J. W. GARMON, *Foreman.*

And thereupon, it is by the court ordered and directed, that said verdict be placed on file and the jury be and is hereby discharged.

On Oct. 3, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Judgment on Verdict.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day came the parties hereto, by their respective attorneys, and upon plaintiff's motion, made in open court, for judgment upon the verdict heretofore entered herein.

And the court being fully advised in the premises considers,

orders and adjudges, and it is by the court considered, ordered and adjudged, that the plaintiff, Granville J. James, have and recover, of and from the defendant, Union Pacific R'y Co., the sum of seven thousand five hundred dollars ($7,500.00) and interest thereon at the rate of — per cent. per annum, together with costs of suit, taxed at — dollars, and that execution issue therefor.

On Wednesday, Oct. 5, A. D. 1892, the following proceedings were had, done and entered of record, to wit:

34 *Motion for New Trial.*

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day comes defendant, by its solicitors, Wright & Baldwin, and file- motion for new trial.

On Saturday, Oct. 8", A. D. 1892, the following proceedings were had, done and entered of record, to wit:

Motion for New Trial Submitted.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now upon this day comes defendant in this cause, and by its solicitors, submits to the court its motion for a new trial.

On Oct. 31, A. D. 1892, the following was filed and entered of record, to wit:

Motion for New Trial Overruled.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

Now, upon this day, this cause came on for further hearing and determination, upon defendant's motion for a new trial, and the court being fully advised in the premises, considers, orders and adjudges that said motion be, and the same is hereby overruled.

And it is further ordered and directed that defendant have sixty days from the filing of above ruling, in the case, in which to have allowed and filed bill of exceptions.

United States Circuit Court in and for the Southern District of Iowa, Western Division.

GRANVILLE J. JAMES
vs.
UNION PACIFIC R'Y CO.

I, J. J. Steadman, clerk of the United States circuit court, in and for the southern district of Iowa, western division, do hereby certify that the annexed opinion is a full, true, complete and correct
35 copy of the opinion filed by Hon. John S. Woolson, in the above-entitled cause, and annex to and transmit the same, with the record certified and returned, in the above-entitled cause.

Seal of Circuit Court of the United States, Southern District of Iowa.

In witness whereof, I hereunto set my hand and affix the seal of said court, this 28″ day of Dec. A. D. 1892.

J. J. STEADMAN,
Clerk U. S. Circuit Court in and for the Southern District of Iowa, Western Division.

In Circuit Court United States, Southern District of Iowa, Western Division.

GRANVILLE J. JAMES
vs.
UNION PACIFIC RAILWAY COMPANY.

F. A. Brogan and Harl & McCabe for plaintiff.
John N. Baldwin for defendant.

On motion for new trial.

WOOLSON, *J.*:

Defendant's motion for a new trial, although containing a large number of points, has been pressed in oral presentation on but few points. These will be taken up separately for consideration.

This is an action brought to recover because of injuries to plaintiff, alleged to have been caused by reason of an unblocked frog on defendant's road. Plaintiff was a brakeman in defendant's employ, and while uncoupling cars at North Bend, Neb., caught his foot, as he alleges, in a frog, which defendant had negligently permitted to remain unblocked, his leg was run over and amputation thereby made necessary. The employment of plaintiff by defendant, and the fact that while uncoupling cars in the line of his employment, plaintiff suffered the injury necessitating amputation, were not disputed. The only dispute was as to whether the injury occurred by reason of a frog being by defendant negligently permitted to remain unblocked.

The points most strongly pressed by defendant in brief, as in the oral presentation, are:

"The court erred in not instructing the jury to return a verdict

for defendant, because plaintiff failed to introduce any proof showing or tending to show

36 (9) That the defendant was guilty of the negligence complained of, and

(10) That the unblocked frog was unsuitable or unsafe, or that the unblocked frog was unfit for the purposes for which they were constructed."

As to *to* the fact claimed, viz: failure of plaintiff to introduce any proof tending to show defendant's alleged negligence, it may not improperly be suggested that the most appropriate time to have pressed this point would seem to have been by motion for a verdict for defendant when plaintiff rested in chief. But defendant did not then apparently desire to press such motion, and therefore proceeded with his case.

The points above quoted may well be considered in connection with the fourteenth assignment in motion for new trial, which is as follows:

"(14) Plaintiff failed to introduce any proof showing or tending to show when the frog in question became unblocked; or that it had been blocked originally and became unblocked; or that the defendant had any knowledge that the frog was unblocked; or that the frog had been unblocked for such a length of time as that the defendant in the exercise of ordinary care should have known that it was unblocked and then blocked the same. Because of plaintiff's said failure the court should have instructed the jury to return a verdict for defendant."

It will be noticed this point is but an amplification of point (9) above stated. The jury were instructed at length on the general lines of negligence, the duty of the defendant company to provide reasonably safe appliances with and about which the employé was to perform his duties, and that failure so to provide would constitute negligence, and that the burden of proof was on plaintiff to prove that defendant had negligently failed to perform these duties, and that such negligence had caused plaintiff's injury. More specifically with reference to the issues involved in this case as presented in the pleadings and evidence introduced, the jury were instructed that their attention should be confined to the frog at which plaintiff claimed to have received his injury; and that—

"In order to recover, plaintiff must prove, by a fair preponderance of evidence, that the frog was not blocked, and also that because of its not being blocked, the injury occurred to plaintiff."

The jury were also told—

"You will notice that unless you find that the frog was unblocked, this case ends right there; for you cannot consider

37 the question as to whether the unblocked frog was the cause of plaintiff's injury until you have first found that the frog was in fact not blocked."

The answer and amendments filed by defendant consist of a general denial and allegations of contributory negligence. But on the trial the issue of contributory negligence was entirely dropped.

While the petition specifically averred that the frog was not at time of injury, and never had been, blocked.

In an earlier portion of the instructions, after stating this contention of plaintiff and denial of defendant, the jury were instructed—

"Thus you are narrowed on this issue to the question, Was the frog blocked or was it not blocked at the time of the injury? * * * If the frog was blocked at the time of the injury, then under the claim made in the petition, plaintiff cannot recover. For his claim of negligence is not sustained if you find the frog was blocked."

And again:

"The pleadings in this case assume, and plaintiff's counsel have conceded in argument before you, that if the frog was properly blocked it could not have caused plaintiff's injury."

Defendant does not claim in his brief that plaintiff introduced no evidence tending to prove the frog was not blocked at time of the injury. Indeed, defendant's brief expressly says—

"Two witnesses only have testified the frog was not blocked;" and one of the instructions asked by defendant was to the effect that the evidence on part of defendant so preponderated on this point over the opposing evidence introduced by plaintiff, that the jury should be instructed therefrom to find for defendant on the fact thus claimed by defendant, viz: that the frog was blocked.

The argument now advanced by defendant in support of his motion is, that even if the frog was unblocked, that fact of itself would not make defendant liable for the injury resulting therefrom; that the proof must go farther, and bring to defendant proof of such unblocked condition; either defendant must be proven to have had actual notice of such unblocked condition, or such condition must be proven to have existed so long as that in the exercise of ordinary care, defendant should have discovered it. Defendant contends the proof did not fulfill these requisites as to notice, and that the jury were not instructed with reference to applying these requisites to the evidence.

38 Neither in the opening statement to the jury, nor in the argument to the jury, after the evidence had closed, did counsel for defendant lay his case on the line of these requisites. Throughout the trial, the position of defendant was that the frog was blocked at the time of the injury. Both in opening statement and in closing argument, defendant's counsel insisted the frog was blocked at time of injury. To this, defendant's evidence was pointed, and in fact limited, so far as it tended to refute the charge of negligence alleged and attempted to be proven by plaintiff. Defendant did not attempt to escape or avoid, by any showing of sudden tearing out of the frog, whatever force attended plaintiff's evidence as to an unblocked condition of the frog. On neither side was any testimony introduced tending to show any sudden destruction of blocking at this frog. But on either side the contest was as to whether the frog was in fact blocked at time of the injury. Plaintiff rested his claim, touching the cause of the injury, on the attempt to prove such injury was caused by the frog being un-

blocked at time of injury. And defendant was equally content, as to evidence introduced, in attempting to prove the frog was then blocked. And defendant's counsel limited his argument to the jury upon the evidence to this same line of defense.

Defendant attempted to prove by its section foreman (of section wherein lay the place of injury), that this frog was blocked, and that the same blocking was in this frog on the day following the injury which had been in the frog at his inspection of the frog not many days preceding the injury, and the foreman so, in substance, testified. While plaintiff sought to prove there was no blocking in the frog on the day immediately following the injury. (The injury occurred about midnight.) Defendant introduced evidence tending to show that its practice was to have all its frogs blocked. And defendant also introduced testimony tending to prove that there was blocking in the frog on the day following the injury, and that the nails in this blocking were then in a rusty condition, thus inferentially negativing that this blocking could have been inserted in the frog after the injury happened. Defendant also sought to prove by its employés who had the keys to the building, in which, at this point, the supply of blocking was stored, that no blocking could have been stealthily obtained and inserted in the frog after the injury, and that the blocking inserted in this frog at a considerable space of time after the injury was substituted for the blocking actually in frog at time of injury. The theory on which defendant's counsel argued his case to the jury was that the blocking, testified to by defendant's witnesses as seen in the frog soon after the
39 injury, was the same blocking, which had been in the frog prior to the injury; and the conclusion was therefore pressed as inevitable, that plaintiff's injury was not caused by an unblocked frog.

But the jury found against defendant on this issue. That is, the jury could not possibly have arrived at the verdict they rendered, without having found the frog was not in fact blocked at time of injury. This conclusion contained within itself, and could only have been reached by the jury after they had found that the theory pressed upon them with such force by defendant's counsel was not correct, which was that the frog was blocked at time of injury. Unless the jury accepted the evidence which tended to prove that *that* the blocking, testified to by defendant's witnesses as in the frog on the day following the injury, was the same blocking in the frog prior to the injury, the jury could not under the evidence find that the frog had ever been blocked. There was testimony with regard to defendant's practice of blocking its frogs. But no part of the evidence applied such practice to this particular frog, except the general statement of this practice. And such general statement could not, of itself, prove this particular frog was blocked at time of injury, or indeed ever had been blocked.

Some testimony appears, if I mistake not one witness on cross-examination said, that if the blocking had been suddenly and by force removed, evidences of such forcible removal would be visible,

and that no such evidences were in fact visible on the day immediately following the injury.

The issues, in the pleadings on either side, and to which the evidence was directed, and as presented to the jury by counsel for plaintiff and defendant, excluded the possibility of this blocking having been so worn away with use as to have become dangerous. Although there was in the testimony of one witness a statement tending to prove that upon the day following the injury he saw, inserted in the frog where blocking should have been inserted, a board, described as a thin fence board. But the evidence introduced by defendant, as well as that given by plaintiff's other witnesses negatived the fact thus testified to.

For the purpose, however, of preventing any mistake on the part of the jury as to this particular statement, the jury were expressly instructed that they could not find for plaintiff on the theory that the blocking had been worn away by use; and that there was neither pleading averring nor testimony showing the blocking had been worn away by use.

Thus also as to the matter of a sudden unblocking of the frog. The jury was told that was not in the case, and that neither pleadings averred, nor testimony submitted, tended to prove such an occurrence.

There was, therefore, but one issue on this point left—was the frog in fact blocked at time of injury. If the jury accepted the testimony of defendant's section foreman, they must find against plaintiff. If the jury found for the theory, which that testimony and other witnesses for defendant tended to prove, they must find for defendant. But the jury refused to accept that theory, viz., that there was blocking in the frog on the day following the injury, and that same blocking was in the frog prior to the injury. They adopted, and gave their verdict, on the opposite theory and claim, that of plaintiff, that this frog, according to the weight of credible evidence introduced, never had been blocked.

In the brief submitted, counsel for defendant emphasizes the farther point, presented in the oral argument as error, that the court erred in refusing to instruct for a verdict for defendant, because plaintiff had failed to present any proof that unblocked frogs were unsafe and dangerous to the employés who were compelled, in coupling and uncoupling cars, to walk where the unblocked frogs were. And also that it was not shown that the blocking in the frogs would not interfere with the complete operation of the road. And counsel's argument urges that this blocking might possibly so affect and interfere with the operation of the road as that defendant might not be compelled to use same; at least plaintiff must show its use was reasonably consistent with the due operation of the road.

A brief consideration of the evidence meets and overthrows this objection.

W. L. Sirles testifies to twelve years' experience in railroading, and that frogs can be so blocked as to prevent employés, while walking over them, from having their feet caught in the frogs. To a question directly touching this matter, he says his experience is

that such blocking will not interfere with the use of the track by the engines and cars.

Richard O'Keefe, with sixteen years' experience in railroading, and having been in employ of defendant as track foreman, testifies to the dangerous condition of unblocked frogs; that blocking renders switch-frogs safe; that the defendant adopted the practice of blocking the frogs to prevent the accidents defendant's employés had theretofore suffered from unblocked frogs, and that, when properly put in, the use of blocking in switch-frogs does not in anywise interfere with the operation of the road.

41 Defendant introduced no testimony antagonizing that given by these two witnesses. And it may properly be mentioned that defendant introduced in evidence a model of a switch-frog, and its use and method of blocking it were fully explained to the jury by witnesses, and enlarged upon by counsel in argument before them, and as to its unsafe and dangerous condition when unblocked.

I have purposely, in considering this objection, refrained from discussing what, if any, judicial notice the court might have taken of the matter had it attempted to decide the point with reference to the conceded and generally universal practice of railroads, preferring that the testimony introduced shall overrule the objection urged.

Defendant farther urges that counsel for plaintiff was guilty of misconduct in his closing argument to the jury, in his manner of referring to failure of defendant to produce a witness (who had in his possession, as asserted by counsel, certain valuable testimony), and that said counsel had personal knowledge that on a former trial this witness, now absent, testified contrary to what counsel now alleged and argued to the jury witness would have testified had defendant produced him.

The court cannot assume that counsel was guilty of misconduct. Every reasonable presumption to the contrary will be indulged in. Whether counsel remembered the testimony the witness gave in the former trial, or even remembered that the witness then testified, the court is not advised. The evidence on this trial had shown the presence of the witness at a time near that of the injury, when he might be presumed to have knowledge of certain material matters. And granting to counsel the benefit of the presumptions in his favor, I do not find misconduct entitling defendant to a new trial.

Defendant also alleges surprise in what are claimed to be inconsistencies in plaintiff's testimony as given on this trial, with that given by him on the former trial of this case; that on the former trial plaintiff testified that the cars were not in motion when, at time of injury, he went between them for the purpose of uncoupling them; whereas on this trial he testifies the cars were then in motion. That there was in force, at time of plaintiff's injury, a rule of defendant, binding on plaintiff, expressly forbidding brakemen going between cars, while in motion, to uncouple them, and

42 that therefore, according to plaintiff's own testimony, he received his injury while violating the rules of the defendant

company and is therefore guilty of contributory negligence. That defendant did not prepare upon this feature of plaintiff's negligence, because it relied on the testimony of plaintiff at the former trial. And that if it had time and had not been taken by surprise at this change in plaintiff's testimony, it could have properly prepared and shown this violation of this rule, etc.

But the insurmountable difficulty in this matter is, that it is nowhere shown why this rule was not introduced on this trial. The court must certainly presume that the existence of this rule was known, at the time of the trial, to the defendant, who made it and put it in force. At least, there is no showing that it was not then known to defendant's officials and those advising with and assisting counsel in the trial of the case. The rule should then have been introduced, or continuance asked to enable its production and introduction. So that whatever surprise may have been created by plaintiff's present testimony, was not a surprise which defendant could not then have overcome and remedied. Defendant permitted such testimony of plaintiff to go to the jury without the introduction of the rule, or attempt to obtain and introduce it. This court cannot grant a new trial, for the purpose of having the rule introduced when the new trial shall be had.

The motion for a new trial is overruled, and the clerk will enter order accordingly.

Defendant is given sixty days from the filing hereof, in which to have allowed and filed bill of exceptions.

The clerk will file this opinion and notify counsel of conclusion reached.

WOOLSON.

United States Circuit Court, Southern District of Iowa, Western Division.

I, J. J. Steadman, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true and complete copies of all the pleadings, proceedings and record entries in a certain cause adjudicated in said court, wherein Granville J. James was plaintiff, and Union Pacific R'y Co. defendant, as full, true and complete as the original of the same, now remain on file and of record in my office. I further certify that the original writ
43 of error, and original citation, with return of or acceptance of service endorsed thereon, are hereto attached and herewith returned.

Seal of Circuit Court of the United States, Southern District.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, this 3" day of Jan'y, A. D. 1893.

J. J. STEADMAN,
Clerk U. S. Circuit Court, Southern District, Western Division of Iowa.

Filed Jan. 5, 1893.

JOHN D. JORDAN, *Clerk.*

44 And on the 5th day of January, A. D. 1893, an appearance of counsel for plaintiff in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES. } No. 223.

The clerk will enter my appearance as counsel for the plaintiff in error.

(Signed) JOHN N. BALDWIN.

(Endorsed:) U. S. circuit court of appeals eighth circuit, December term, 1892. No. 223. Union Pacific Railway Company, plaintiff in error, *vs.* Granville J. James. Appearance. Filed Jan. 5, 1893. John D. Jordan, clerk. (Signed) John N. Baldwin, counsel for pl'ff in error.

And on the 3rd day of February, A. D. 1893, an appearance of counsel for defendant in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES. } No. 223.

The clerk will enter my appearance as counsel for the defendant in error.

(Signed) FRANCIS A. BROGAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1892. No. 223. Union Pacific Railway Company, pl'ff in error, *vs.* Granville J. James. Appearance. Filed Feb. 3, 1893. John D. Jordan, clerk. Francis A. Brogan, Omaha, Neb., counsel for defendant in error.

45 And on the 17th day of February, A. D. 1893, a stipulation to amend the transcript of record was filed in said cause; which said stipulation is in the words and figures following, to wit:

In the Circuit Court of Appeals for the Eighth Circuit.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs
GRANVILLE J. JAMES, Defendant in Error. } Stipulation.

It is agreed by and between the parties hereto that the attached certified copy of the record with reference to the discharge of the jury in the first trial of this case in the circuit court of the United States for the southern district of Iowa, western division, may be inserted in the certified copy of the transcript of the record and also in the printed record of this case.

(Signed) WRIGHT & BALDWIN,
Att'ys for Pl'ff in Error.
F. A. BROGAN,
HARL & McCABE,
Att'ys for Def. in Error.

Now, on this 12th day of April, A. D. 1892, the following proceedings were had, done, and entered of record, to wit:

GRANVILLE J. JAMES
vs.
UNION PACIFIC RAILWAY CO. } Jury Discharged.

Now, upon this day, came the parties hereto, by their respective attorneys, and thereupon came the jury herein, and it having been made to appear to the satisfaction of the court that the jury had been in deliberation for twenty-four hours and the jurors had not been able to arrive upon a verdict herein, and thereupon the foreman, in the presence of the jurors, announced to the court that the jurors were unable to arrive at a verdict, and the court, being now fully advised in the premises, orders and directs that the jury
46 be, and it is hereby, discharged, and this cause be, and it is hereby, continued.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Iowa,

I, J. J. Steadman, clerk of United States circuit and district court, southern district of Iowa, western division, do hereby certify the above and foregoing to be a full, true, and complete copy of the record entry in case of Granville J. James *vs.* U. P. R'y Co. as fully as the same appears of record in this office.

In witness whereof I hereunto set my hand and affix the seal of the circuit — of the southern district of Iowa.

(Signed) J. J. STEADMAN,
Clerk U. S. Circuit Court, Southern District of Iowa, Western Division.

(Endorsed:) United States circuit court of appeals for eighth circuit. No. 223. U. P. R'y Co. *vs.* Granville J. James. Stipulation to amend record and certified copy of record entry. Filed Feb. 17, 1893. John D. Jordan, clerk.

And on the 10th day of April, A. D. 1893, a further stipulation to correct the transcript of record and also the printed record in said cause was filed; which said stipulation is in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error.
} Stipulation. 223.

It is hereby stipulated and agreed by and between the plaintiff and the defendant above named, by their respective attorneys, that there is an error and diminution of the record in the above-entitled cause in that on page 29 of the record as filed in this court, in the testimony of the witness A. S. Day, in the sentence "there
47 was no blocking or piles of blocking near it," the word "piles" was erroneously inserted in the record by the clerk of the trial court, instead of the word "pieces," which is the word used in the bill of exceptions in the lower court, and that the sentence should read: "And there was no blocking or pieces of blocking near it." It is agreed that the clerk of this court shall correct the said record herein by inserting in lieu of the word "piles," in the said sentence, the word "pieces," and shall make the same correction in the printed copies of the record.

(Signed) JOHN N. BALDWIN,
Att'y for Plaintiff in Error.

(Signed) F. A. BROGAN,
Att'y for Defendant in Error.

(Endorsed:) No. 223. United States circuit court of appeals, eighth circuit. Union Pacific Railway Company, plaintiff in error, *vs.* Granville J. James, defendant in error. Stipulation to correct transcript and printed record. F. A. Brogan, att'y for plaintiff in error. Filed April 10, 1893. John D. Jordan, clerk.

And on the 16th day of May, A. D. 1893, in the record of the proceedings of said court is an entry of the submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

TUESDAY, *May* 16, 1893.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error. } No. 223.

In error to the circuit court of the United States for the southern district of Iowa.

This cause having been called for hearing in its regular order, argument was commenced by Mr. John N. Baldwin and Mr.
48 John M. Thurston for plaintiff in error, continued by Mr. Francis A. Brogan for defendant in error, and concluded by Mr. John N. Baldwin in behalf of plaintiff in error.

Thereupon this cause was submitted to the court upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

And on the 26th day of June, A. D. 1893, an opinion of the said United States circuit court of appeals was filed in said cause; which said opinion is in the words and figures following, to wit:

49 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1893.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error. } No. 223. In Error to the Circuit Court of the United States for the Southern District of Iowa.

Mr. John M. Thurston and Mr. John N. Baldwin for plaintiff in error.

Mr. Francis A. Brogan for defendant in error.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

THAYER, district judge, delivered the opinion of the court:

The defendant in error while in the employ of the Union Pacific Railway Company, as a brakeman, sustained an injury to his left foot and leg which necessitated amputation, in consequence of which injury he brought an action against the railway company, in the circuit court for the southern district of Iowa, and recovered a verdict in the sum of $7,500. The material allegations contained in his petition, or complaint, were as follows: That in the discharge of his duty as a brakeman on one of the defendant's freight trains, he was required to assist in switching some freight cars from the main track to a side track, at a station called North Bend, in the

State of Nebraska; that in the discharge of such duty it became necessary to go between two cars for the purpose of coupling them; that at the place where the coupling had to be done, at the junction of the main and side tracks, there was an angle or frog formed by the rails, which, without being blocked, was extremely dangerous, and liable to cause injury to any one who happened to step therein; that at the time the coupling was attempted, it was so dark that it was impossible to see whether the frog was blocked; that at the time the plaintiff entered into the defendant company's service, he was informed by its roadmaster, that all of the frogs and angles along the defendant's road were properly filled and blocked; *that in point of fact the angle or frog where the coupling was done, was not at the time of the accident, and had not been blocked or filled, and for want of such blocking was in a very dangerous condition;* that in consequence thereof, as plaintiff was attempting to couple said cars, his foot became fastened in the angle or frog, so that he could not extricate it, and that by the movement of the train his left foot and leg were mangled and crushed.

The defendant company filed an answer, wherein it admitted that the plaintiff was in its employ as a brakeman, but it denied all of the other allegations of the complaint. It furthermore pleaded that at and prior to the accident, plaintiff had acquired full knowledge of the condition of all of the frogs and switches at North Bend, where the accident happened, and with such knowledge remained in the defendant's service, and thereby waived his right to claim compensation in consequence of injuries sustained by reason of any alleged defects in the frogs and switches at that station.

The controversy before the jury appears to have turned mainly on the question, whether the frog complained of was blocked at the time of the accident, and whether the want of blocking, as charged in the complaint, caused the injury.

The plaintiff produced several witnesses who testified in substance that they examined the frog the morning after the accident occurred, and found that it was not blocked or filled. On the other hand the defendant produced a greater number of witnesses, who testified in substance, that they examined the frog either on the morning succeeding the accident, or a day or two thereafter, and that they found the frog properly blocked and filled.

At the conclusion of all of the evidence, the defendant asked the court to give two instructions, and its refusal to give such requests is assigned for error. The first of these requests (omitting immaterial portions thereof), was as follows:

"In order to entitle the plaintiff to recover, it is not only necessary that he should prove that the frog in question was not blocked, but also that the company had knowledge or notice of the fact, or that the company, by the exercise of ordinary care and diligence, could have known that the frog in question was not blocked. There is no proof whatever, in this case, proving or tending to prove, that the company had any notice or knowledge whatever that the frog in question was not blocked. On the contrary, the evidence of the plaintiff tends to show that the frog in

question was blocked, but it is claimed that the blocking was insufficient and had been permitted to become worn. *There is no claim whatever in this case of negligence upon the part of the company in having the frog blocked and permitting the same to become worn or out of repair. This action is predicated upon the fact that the*
51 *frog had never been blocked. This being the real status of the case, and there being an entire failure of proof that defendant had any knowledge or notice of such, as is required by law, as to the fact that this frog was not blocked, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant.*"

The second instruction, above referred to, was in substance a direction to the jury to find for the defendant company, *on the ground*, that the testimony tending to show that the frog was not blocked at the time of the accident, *was so completely overcome and overborne by the defendant's testimony to the contrary*, as to justify the court in determining that issue of fact, and in withdrawing it from the consideration of the jury.

It is hardly necessary to observe that the second of these instructions was properly refused. There was testimony of a positive and direct character that there was no blocking in the frog on the night of the accident, and there was much evidence to the contrary. If the trial court had withdrawn that issue from the jury, on the theory outlined in the instruction, or on any other theory, it would have invaded the province of the jury, and its action would have been clearly indefensible.

We are also of the opinion that the first instruction (above quoted) was properly refused.

The concluding paragraph of the instruction, which we have placed in italics, correctly states, that under the pleadings in the case, the plaintiff below predicated his right to recover, *on the ground that the frog had never been blocked*. He complained of an original faulty construction of the frog—to wit, the failure of the company to insert a block of wood or other material in the sharp angle formed by the junction of the rails, in consequence of which trainmen were liable to have their feet caught in the angle. The complaint contained no averment that the defendant company had suffered and permitted the frog to become and to remain out of repair, for such a length of time, that notice of the defect might be inferred, but the charge was specific, *that the frog never had been blocked or filled*. While the instruction which was asked correctly construed the pleadings and the issues arising thereunder, yet it assumed (and in this respect it was erroneous) that proof of an original faulty construction of the frog, was not sufficient to charge the defendant company with notice of the defect. We think that this position is untenable. Where the defect in an appliance is shown to be structural, and is of such a character as renders it unsafe, it may be inferred that the employer was aware of the defect. It is the master's duty to exercise ordinary care in providing tools, machinery and appliances, that are reasonably safe, and if appliances which have been furnished by the employer or his subagents, are shown to have been originally defective and unsafe, the burden does not rest on an

employee, when injured by such defect, to produce further
52 evidence that the master had notice thereof. *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14, 46; *Morton v. Railroad Co.*, 81 Mich., 423, 434; *Chicago & Eastern Ill. R. R. Co. v. Hines*, 132 Ill., 161, 168; *Village of Jefferson v. Chapman*, 127 Ill., 438; *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240; *Branch v. Port Royal R'y Co.*, 35 South Carolina, 405; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S., 642, 646; *Shearman and Redfield on Negligence*, § 217, fourth edition. We think, therefore, that no error was committed in refusing the instruction in question.

Alleged errors in the instructions which were given by the court, form the next subject of contention. In the course of the charge the court made use of the following language: "*The defendant claims that the frog in question was blocked; that is its contention in the matter. Thus you are narrowed on this issue to the question, was the frog blocked or was it not blocked at the time of the injury?*" And again, "*the question is, was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury, then the plaintiff has not proven his case as his pleadings make it herein, and the defendant is entitled to your verdict; the defendant is not required to prove that the frog was blocked; the burden is upon the plaintiff, and he must prove that it was unblocked.*" It is contended by counsel for the plaintiff in error, that these portions of the charge limited the jury to a finding which was insufficient to support the verdict, in that it did not require the jury to determine how long the alleged defect in the frog had existed, or whether the defendant had, or ought to have had knowledge of its condition prior to the accident.

It will be observed that the jury were nowhere instructed that the fact that the frog was not blocked on the night of the accident, *was in itself*, sufficient to warrant a verdict in favor of the plaintiff. That is a deduction of counsel rather than the language of the trial judge. We concede, however, that the foregoing extracts from the charge give some color to the contention of counsel, if they are considered by themselves, without reference to the context, and also without reference to the pleadings or the evidence. But it goes without saying, that a mere *excerpt* from a charge ought not to be wrested from its context, and judged by itself, without reference to other directions which may have been given by the trial court. In determining whether the excerpts in question were prejudicial or otherwise, the charge must be considered as a whole, and in connection with the pleadings and the testimony. It appears from an examination of the record, that in connection with the statements above quoted, the court further instructed the jury in substance, that the plaintiff did not claim in his petition, and had not attempted to prove, that the frog although originally well blocked, had been allowed to become defective through use, or that the defect was occasioned by an accidental removal of the blocking. The jury were distinctly told, as we think, that negligence of that kind was neither charged nor proven, and that there could be no recovery
53 on such grounds. Furthermore, it is shown by the bill of exceptions that both parties tried the case, upon the

assumption, that if the frog was not blocked when the accident happened, then in all probability it never had been blocked, and that the condition of the switch-angle, *as to blocking*, on the night of the accident, was in reality the vital issue to be considered and determined by the jury. No effort appears to have been made by the railway company to show, either by its own witnesses, or by a cross-examination of the plaintiff's witnesses, that the switch-angle was originally blocked, and that without fault on its part it had possibly got out of repair. On the contrary the sole effort of the railway company seems to have been to satisfy the jury, by numerous witnesses, that on the morning succeeding the accident the switch-angle was properly filled, that the plaintiff's witnesses had either testified falsely or were mistaken, and that the injuries complained of could not have been occasioned by any defect in the frog. That such was the attitude of the parties before the jury, and that the case was tried on the assumption last stated, is made manifest by the remarks of the trial judge in overruling the motion for a new trial, which have been incorporated into the record. Speaking of the same objections to the charge which are now urged in this court, he says:

"Neither in the opening statement to the jury, nor in the argument to the jury, after the evidence had closed, did counsel for the defendant lay his case on the line of these requisites. Throughout the trial, the position of defendant was that the frog was blocked at the time of the injury. Both in opening statement and in closing argument defendant's counsel insisted that the frog was blocked at the time of injury. To this, defendant's evidence was pointed, and in fact limited, so far as it tended to refute the charge of negligence alleged and attempted to be proven by plaintiff. Defendant did not attempt to escape or avoid, by any showing of sudden tearing out of the frog, whatever force attended plaintiff's evidence as to an unblocked condition of the frog. On neither side was any testimony introduced tending to show any sudden destruction of blocking at this frog. But on either side the contest was as to whether the frog was in fact blocked at the time of the injury. Plaintiff rested his claim, touching the cause of the injury, on the attempt to prove such injury was caused by the frog being unblocked at time of injury. And defendant was equally content, as to evidence introduced, in attempting to prove the frog was then blocked. And defendant's counsel limited his argument to the jury upon the evidence to this same line of defense."

In view of the fact that the case was tried upon the theory, that under the pleadings the plaintiff was bound to establish an original faulty construction of the frog, by reason of which it was at the time of the accident, and always had been, dangerous, and in view of the fact that the jury were in effect instructed that there
54 could be no recovery by the plaintiff except on the *precise ground stated in his petition*, we fail to see how the expressions complained of in the charge could have done any harm. It is obvious, we think, that the jury must have understood, from the whole tenor of the instructions, that the plaintiff was not entitled to a ver-

dict, unless, as charged in the complaint, the alleged defect in the frog was due to its *original construction*, and was not occasioned by long-continued use, or by an accidental removal of the blocking. At all events, if the plaintiff in error desired a more specific instruction, to the effect that the jury must be satisfied, not only that the frog was not blocked on the night of the accident, but that it never had been blocked or filled prior thereto, then it was its duty to have asked for such an instruction, which it failed to do. On the contrary, its insistence at the trial seems to have been, that even though the frog was unblocked and never had been, that it was not liable for the injury complained of, unless it had actual or constructive notice of the defect, and that the *onus* was on the plaintiff to show such notice. As we have already held, this view of the law was and is erroneous.

It is further contended that the court erred in assuming that an unblocked switch-angle or frog is a dangerous and unsafe appliance. With reference to this contention it is only necessary to say, that as no exception was taken to the action of the trial court in charging the jury that an unfilled switch-angle was a dangerous contrivance, we cannot notice the alleged error. The plaintiff offered some testimony tending to show, that without being blocked, switch-frogs are unsafe and are liable to occasion injuries. We think that it might properly have been left to the jury to determine, whether the maintenance of an unblocked frog at the time and place of the accident, was an act of culpable negligence. But as the court was not requested to submit that issue to the jury, and as no exception was taken to the action of the court in deciding that the maintenance of such a switch was, *per se* a negligent act, no error was committed which can be noticed by this court. It follows that as none of the assignments of error appear to be tenable the judgment of the circuit court must be *affirmed*.

Filed June 26, 1893.

55 And on the 26th day of June, A. D. 1893, in the record of the proceedings of the said United States circuit court of appeals is an entry of judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

MONDAY, *June* 26, 1893.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error. } No. 223.

In error to the circuit court of the United States for the southern district of Iowa.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Iowa and was argued by counsel.

On consideration whereof it is hereby ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Granville J. James recover against the Union Pacific Railway Company the sum of twenty dollars for his costs herein and have execution therefor.

And on the 12th day of August, A. D. 1893, the plaintiff in error, by its counsel, filed in said cause an assignment of errors in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

56 Now comes The Union Pacific Railway Company, plaintiff in error herein, and says that in the record and proceedings herein there is manifest error in this, and it makes the following assignments thereof:

1. Because the United States circuit court of appeals for the eighth circuit erred in affirming the judgment of the United States circuit court for the southern district of Iowa, western division, rendered in this cause.

2. Because said court erred in not reversing said judgment and in not remanding the same to the said circuit court for a new trial.

3. Because the said court erred in sustaining the action of the said trial circuit court in overruling the plaintiff in error's motion for an order to direct a verdict for it in said cause.

4. Because the said court erred in sustaining the action of said trial circuit court in its refusal to give to the jury the following instruction requested by the plaintiff in error:

"In his petition the plaintiff predicates his right to recover upon this one distinct charge of negligence: that the frogs and switches of the defendant's were blocked, and that when he entered the service of the company he was so informed by the proper officer thereof, but that the defendant negligently failed to block the frog at the switch in North Bend at the time this plaintiff was injured, and that without any fault on his part his foot got caught in said frog and he was injured thereby. It is shown by the evidence that it was the rule of the defendant to have its frogs upon its line of railway blocked, and that generally its frogs were blocked. In order to entitle the plaintiff to recover, it was not only necessary that he should prove that the frog in question was not blocked, but also that the company had knowledge or notice of that fact or that the company, by the exercise of ordinary care and diligence, could have known that the frog in question was not blocked. There is no proof whatever in this case proving or tending to prove that com-

pany had any notice or knowledge whatever that the frog in question was not blocked. On the contrary, the evidence of the plaintiff tends to show that the frog in question was blocked, but it is claimed that the blocking was insufficient and had been permitted to
57 become worn. There is no claim whatever in this case of negligence upon the part of the company in having the frog blocked and permitting the same to become worn or out of repair. This action is predicated upon the fact that the frog had never been blocked. This being the real status of the case, and there being an entire failure of proof that defendant had any knowledge or notice of such, as is required by law, as to the fact that this frog was not blocked, the plaintiff cannot recover, and you are instructed to return a verdict for the defendant."

5. Because said court erred in sustaining the action of the said trial circuit court in giving to the jury the following instruction:

"Thus you are narrowed on this issue to the question, was the frog blocked or was it not blocked at the time of the injury?"

6. Because said court erred in sustaining the action of the said trial circuit court in giving to the jury the following instruction:

"There has been some evidence introduced tending to show that this frog was originally well blocked—that is, there is some evidence tending to show that the company had all the frogs in the yard about that switch originally well blocked. Now, if defendant had the frog originally well blocked and put in good condition and if it is not shown that the frog became unblocked in such a way as that the company would be negligence because of it, the plaintiff cannot recover in this case.

To illustrate further, if evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at a time so near the injury as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen or otherwise before the injury, then, in an accident of that kind, the company would not be liable for injury to plaintiff, because the company would not have been negligence in not ascertaining that the block had been thus removed—that is, if the frog had been originally well blocked and had by some sudden accident become unblocked and an accident occurred, as that to the plaintiff, immediately after the unblocking of the frog or so near to the time as that the company ought not, in the exercise of reasonable care on this point, to
58 have found out and discovered before the injury that it had become unblocked, then the company, in such a case, as you will see, would not be negligent, and therefore would not be responsible if plaintiff was injured by such a frog. This would be a pure accident and included within the risk and hazard he assumed in his contract of employment.

But if, on the other hand, in the case I have given you, the company, after the sudden unblocking of the frog, had permitted it to remain unblocked for such a length of time as that the company, exercising ordinary care, ought to have discovered its unblocked

condition by inspection or otherwise, then, you see, the company would have been negligent, and if plaintiff was injured at that frog because of its being thus negligently left unblocked he would be entitled to recover; but there is nothing in this case to show that there was any sudden unblocking of the frog. I have simply given this as an illustration tending to illustrate how negligence of the company might arise in such a case; the evidence does not bring it into this case.

I will give another illustration which may perhaps assist you in reaching a conclusion as to the truth in this matter: Under some circumstances it might be that the wearing away of the surface of the block would be such as that the company would become negligent in not ascertaining the wearing away of the block and the dangerous condition into which the frog had come from such wearing and not replacing it in proper time with an unworn block; but in this suit, which you are now trying, nothing of that kind is in issue. There is no allegation in the petition that the blocking of the frog had become worn so as to become dangerous, so you will not consider that evidence, whether the block had become worn or not, which otherwise might have been in this case.

There is no claim before you and you will not consider whether by wear upon the block it might have become dangerous so that the company by allowing it to remain in that condition was negligent."

7. Because said court erred in sustaining the action of the said trial circuit court in giving to the jury the following instruction:

"The question is, was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury, then the plaintiff has not proven his case as his pleadings make it herein, and the defendant is entitled to your verdict. The defendant is not
59 required to prove that the frog was blocked; the burden is upon the plaintiff and he must prove that it was unblocked. Before the plaintiff can have your verdict upon this point he must sustain the burden of proof and show that the frog was not blocked at the time of the injury."

8. Because said court erred in holding that the defect in question was structural and of such a character that the employer was charged with knowledge of its defect.

9. Because said court erred in holding that the trial circuit court had instructed the jury that knowledge of the defect in question must be proven, or the defect had remained such a length of time as that the company was charged with knowledge of the same.

10. Because said court erred in holding that the case of the company was tried on the theory solely as to the condition of the frog with reference to it being blocked on the night of the accident.

11. Because said court erred in not reversing said cause because of the error committed by the trial circuit court in submitting to the jury issues which were not warranted, either by the pleadings

or the evidence, and as embodied in the instructions given by the trial court and found on pages nine, ten, and eleven of the transcript of record, and also in the sixth assignment of errors herein.

The plaintiff in error prays and asks for the reversal of the judgment in this case.

JOHN M. THURSTON,
(Signed) JOHN N. BALDWIN,
For Plaintiff in Error.

(Endorsed:) No. 223. United States circuit court of appeals, eighth circuit. The Union Pacific Railway Company, plaintiff in error, *vs.* Granville J. James, defendant in error. Assignment of errors and prayer for reversal. Filed Aug. 12, 1893. John D. Jordan, clerk.

And on the 23rd day of August, A. D. 1893, a supersedeas bond and writ of error was filed in said cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, The Union Pacific Railway Company, as principal, and The Lawyers' Surety Company of New York, a corporation duly organized under the
60 laws of the State of New York, but doing business in Boston, in the county of Suffolk and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Granville J. James in the full and just sum of fifteen thousand dollars, to be paid to the said Granville J. James, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the May term, A. D. 1893, of the United States circuit court of appeals for the eighth circuit, on the 26th day of June, A. D. 1893, in a suit depending in said court between The Union Pacific Railway Company, as plaintiff in error, and Granville J. James, defendant in error, judgment was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Granville J. James, citing and admonishing him to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to

make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY CO.,
By OLIVER W. MINK, *Second Vice-Pres.*

Attest: ALEK MILLAR, *Secretary.*

THE LAWYERS' SURETY CO. OF N. Y.,
By FELIX RACKEMANN, *Resident Vice-Pres.*
JOSEPH G. STEARNS, *Resident Ass't Sec.*

GEORGE D. AYERS,
To L. S. Co.

Sealed and delivered in presence of—
W. A. FINNEY.
F. W. HILL.

61 Aug. 17, 1893.

The foregoing bond is approved as a supersedeas.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the U. S.

No. 223. May term, 1893. Union Pacific Railway Co., pl'ff in error, *vs.* Granville J. James. Supersedeas bond on writ of error. Filed Aug. 23, 1893. John D. Jordan, clerk.

And on the 23rd day of August, A. D. 1893, a writ of error from the Supreme Court of the United States to the said circuit court of appeals was filed in the clerk's office of said court, the original of which writ of error, with the clerk's return indorsed thereon, is hereto attached and herewith returned:

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court of appeals, eighth circuit, before you, at the May term, 1893, thereof, on June 26th, 1893, The Union Pacific Railway Company, plaintiff in error, and Granville J. James, defendant in error, a manifest error hath happened, to the great damage of said The Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record

and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the 16th day of September, 1893, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

63 Issued at office, in the city of Washington, D. C., with the seal of the Supreme Court of the United States.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court United States.

Allowed by—
DAVID J. BREWER,
Associate Justice.

Return to Writ of Error.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said United States circuit court of appeals at office, in the city of St. Louis, Mo., this 2d day of Sept., A. D. 1893.

JOHN D. JORDAN,
Clerk of the U. S. Circuit Court of Appeals, Eighth Circuit.

64 [Endorsed:] U. S. circuit court of appeals, eighth circuit. The Union Pacific R'y Co., plaintiff in error, *v.* Granville J. James, defendant in error. Writ of error. Filed Aug. 23, 1893. John D. Jordan, clerk.

65 And on the 2nd day of September, 1893, an original citation, with return of service indorsed thereon, was filed in the clerk's office of said circuit court of appeals; which said original citation is hereto attached and herewith returned:

66 The United States of America to Granville J. James, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Union Pacific Railway Company was plaintiff in error and you were defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 24th day of August, 1893, I received this citation, and on the 24th day of August, 1893, I served the same upon the within-named defendant's attorney, F. A. Brogan, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska,
By LOUIS BOEHME,
Deputy United States Marshal.

67 [Endorsed:] U. S. circuit court of appeals, eighth circuit. The Union Pacific R'y Co., plaintiff in error, *v.* Granville J. James, defendant in error. Citation. Filed Sep. 2, 1893. John D. Jordan, clerk.

68 *Clerk's Certificate.*

United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing transcript, consisting of 67 pages, contains a full, true, and complete copy of order, the papers, pleadings, and proceedings, including the opinion of said circuit court of appeals, in a certain cause, adjudicated in said court, wherein The Union Pacific Railway Company was plaintiff in error and Granville J. James was defendant in error, No. 223, May term, A. D. 1893, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the originals of the writ of error and citation are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Mo., this 2d day of Sept., A. D. 1893.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,389. U. S. circuit court of appeals, 8th circuit. Term No., 270. The Union Pacific Railway Company, plaintiff in error, *vs.* Granville J. James. Filed September 11, 1893.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
GRANVILLE J. JAMES.
No. 270.

STIPULATION.

It is hereby stipulated and agreed by and between the plaintiff in error and the defendant in error, by their respective counsel, that there is a defect and a diminution in the record of the above cause in this court, in this, that the petition for removal presented by the plaintiff in error to the district court of Pottawattamie county, Iowa, and afterwards filed in the circuit court of the United States for the southern district of Iowa, has been by some mistake or oversight omitted from the record transmitted to this court, and it is hereby agreed that the copy of the said petition for removal, hereto attached and duly certified by the clerk of the said court, may now be filed in this court and made a part of the record herein, the necessary formalities for suggesting a diminution of the record and for supplying the same being hereby waived.

JNO. M. THURSTON,
Attorney for Plaintiff in Error.
FRANCIS A. BROGAN,
Attorney for Defendant in Error.

In the District Court of Pottawattamie County, Iowa, at September Term, 1890.

GRENVILLE J. JAMES
vs.
THE UNION PACIFIC RAILWAY COMPANY.

Petition for Removal to the Circuit Court of the United States.

Your petitioner, The Union Pacific Railway Company, respectfully shows to this honorable court that it was at the time of the commencement of this suit and still is a corporation created and organized under and by virtue of an act of the Congress of the United States, approved July 1st, 1862, entitled "An act to aid in the construction of railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the amendments thereto; that it is not a banking corporation, and that the cause of action herein arises under and by virtue of the laws of the United States, to wit, the act and amendatory acts above referred to.

That your petitioner was at the time of the commencement of this suit and still is an inhabitant of the southern district of Iowa, and

that the matter and amount in dispute in the above-entitled action exceeds, exclusive of costs and interest, the sum and value of two thousand dollars.

Your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further except to make the order for removal required by law, and to accept the said surety and bond and to cause the record therein to be removed to the said circuit court of the United States in and for the southern district of Iowa, western division.

WRIGHT & BALDWIN,
Attorneys for Petitioner,
The Union Pacific Railway Company.

STATE OF IOWA, }
Pottawattamie County, } *ss:*

I, John N. Baldwin, being duly sworn, on my oath say that I am a member of the firm of Wright & Baldwin, attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

JOHN N. BALDWIN.

Sworn to before me and subscribed in my presence by the said John N. Baldwin this — day of ——, 1890.

A. W. ASKWITH,
[SEAL.] *Notary Public.*

UNITED STATES OF AMERICA, }
Southern District of Iowa, } *ss:*

I, J. J. Steadman, clerk of the United States circuit court in and for the southern district of Iowa, western division, hereby certify the above and foregoing to be a true and correct copy of the "petition for removal to the circuit court of the United States" as full and complete as the same remains of the files of this office.

In witness whereof I hereunto set my hand and affix the seal of the U. S. circuit court aforesaid this 1st day of May, 1896.

[Seal of Circuit Court of the U. S., Southern District of Iowa, Council Bluffs.]

J. J. STEADMAN,
Clerk U. S. Circuit Court, Southern District of Iowa, Western Division,
By A. S. HAZELTON, *Deputy.*

Endorsed on cover: Case No. 15,389. Supreme Court U. S., October term, 1895. Term No., 270. The Union Pacific Railway Co., pl'ff in error, *vs.* Granville J. James. Stipulation and addition to record. Filed May 5, 1896.

FILED
APR 27 1896
JAMES H. McKENNEY,
CLERK

(15,389.)

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 270.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

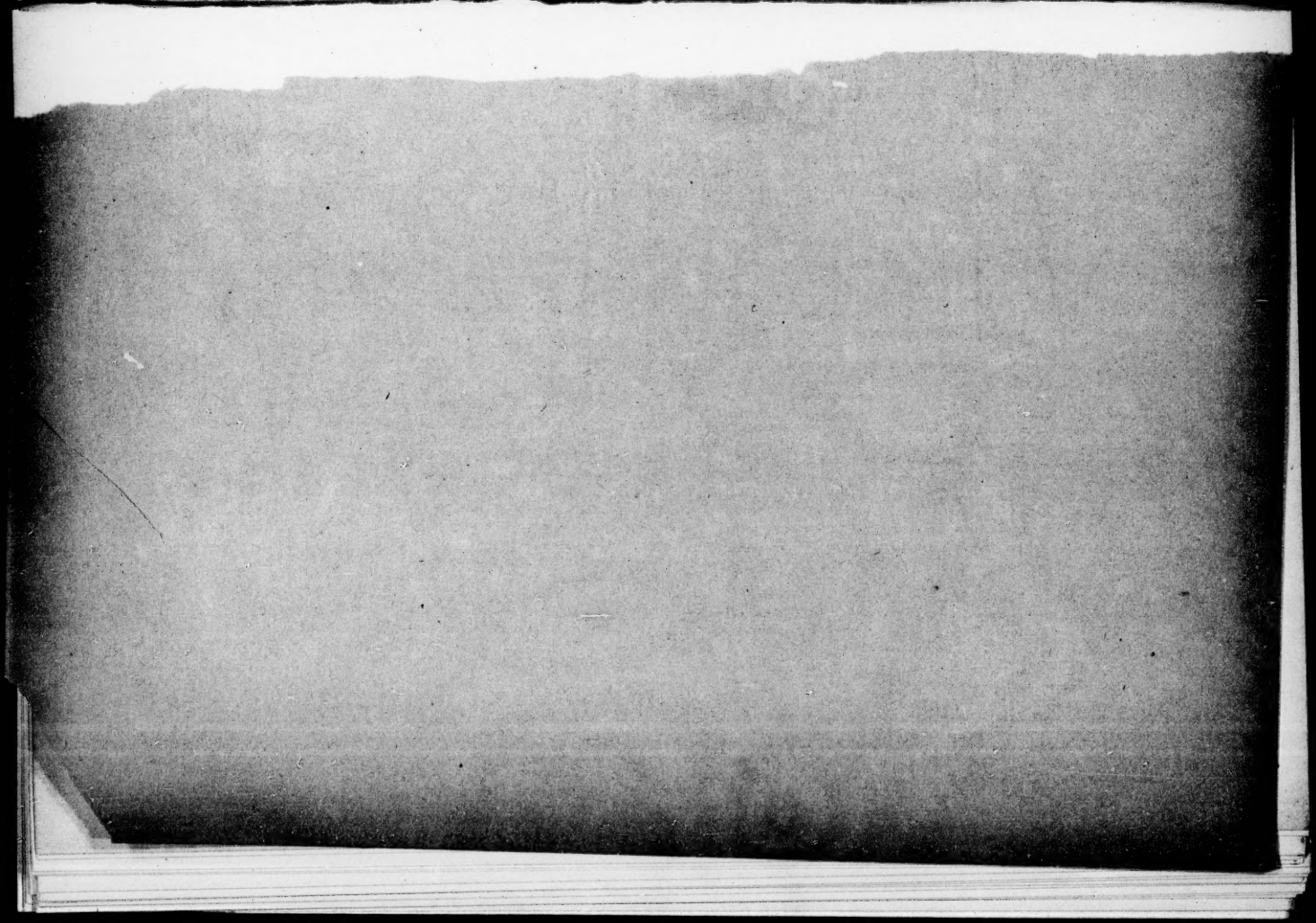
GRANVILLE J. JAMES.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.



(15,389.)

Supreme Court of the United States.

OCTOBER TERM, 1895. NO. 270.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GRANVILLE J. JAMES.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

We are advised that it is the purpose of solicitors for defendant in error to ask the court to dismiss the writ of error herein and confirm the judgment of the court below for the reason that the transcript of the record fails to show that there was jurisdiction in the Circuit Court of the United States for the Southern District of Iowa, Western Division, to hear and determine the case. It is true that the certificate of the clerk of said court, found on page 37 of the printed record, shows that the transcript filed in the Circuit Court of Appeals contained full, true, and complete copies of all the pleadings, proceedings, and record entries in the cause. It is also true that the certificate of the clerk of the Circuit Court of Appeals, as found on page 53 of the printed record, shows that

the transcript filed in this court contains a full, true, and complete copy of all the orders, papers, pleadings, and proceedings of said Circuit Court of Appeals. It is also true that the record shows that the case was commenced by petition filed in the District Court of Pottawatamie County, in the State of Iowa, and there is nothing to show in what manner or by what proceedings the case was transferred from the State court of Iowa to the Circuit Court of the United States.

If the counsel of the defendant in error desire to avail themselves of whatever advantage they can secure from this defect in the record, we are prepared to submit to the judgment of the court, but we very likely differ with opposing counsel as to what the judgment of the court should be in such case. We insist that the record as exhibited by us in this court does not show that the trial court had jurisdiction of the cause and it does show that the trial court did not have jurisdiction of the cause. Defendant in error has not suggested any diminution in the record, and we do not deem it necessary to make such suggestion on behalf of plaintiff in error. It must, therefore, be taken by this court that the record is full and complete and upon the record it is manifest that the United States Circuit Court did not have any jurisdiction to pronounce judgment.

Counsel for defendant in error will insist that by this failure of the record to show jurisdiction they are entitled to the dismissal of the writ of error which would work an affirmance of the judgment. We insist that this court must reverse the judgment for want of jurisdiction. In support of our contention we cite the case of Railway Company *v.* Swan (111 U. S., p. 379)—more particularly citing the attention of the court to pages 383, 384, and 385, where the rule is laid down in the following clear and unmistakable language: "The course of the court is on its own motion to reverse such a judgment for want

of jurisdiction * * * when it does not appear affirmatively that it does exist." This question of jurisdiction can be raised by either party, Craswell *v.* Belanger, 6th C. C. A., page 1; nor is it necessary that either party should suggest or insist upon want of jurisdiction, for the court will of its own motion look into the record to see whether or not there was jurisdiction in the trial court. Graves *v.* Corbin, 132 U. S., 571, 590; Burnham *v.* Bank, 3 C. C. A., 486 (8th circuit); Craswell *v.* Belanger, *supra;* Railway Company *v.* Twitchell, 8 C. C. A., 237. We also refer to the following cases: Bors *v.* Preston, 111 U. S., 252 (255); Robertson *v.* Cease, 97 U. S., 646 (648); and Grace *v.* Insurance Company, 109 U. S., 278 (283).

Indeed, the rule must be as above stated, for the mere dismissal of an appeal or writ of error by the appellate court leaves the judgment in the court below to stand, and there would be presented the anomalous spectacle of a court which had no jurisdiction to enter a judgment enforcing that very judgment (void upon its face) by further process, the right to issue which must necessarily relate back to the original question of jurisdiction.

II.

If this question of jurisdiction is not decisive, and the Court shall proceed to a consideration of the case as presented in the record, then we submit the following:

Granville J. James was injured while in the employ of the Union Pacific Railway Company as a brakeman. For some time prior to July, 1888, he had been employed as a brakeman on a freight train. About one o'clock at night on the 15th of July, 1888, at North Bend, in the State of Nebraska, while, as he claimed, he was in the performance of his duty as a brakeman and

also assisting in switching freight cars of said company, he received such injuries as necessitated finally the amputation and loss of his left leg. James, in his testimony, stated that he had stepped between two freight cars for the purpose of making a coupling of the same, and while engaged in this work his right foot was caught in a frog at a switch, he was thrown around on his back, and his left foot was run over and crushed, rendering amputation necessary. The negligent acts charged against the company were, that at the time James entered its employ it advised him that the frogs on its system were blocked, but that it had negligently permitted the frog at the switch in question in North Bend to remain unblocked; that the angle or frog in question had never been blocked or filled, and that James, while in the discharge of his duties, in attempting to couple the cars in question, was caught in the unblocked frog and injured.

At the first trial of this case the jury disagreed. Upon the second trial a verdict was rendered for James. At the close of all the testimony in the case, offered by both sides, the plaintiff in error moved the court to instruct the jury to return a verdict for it, which the court refused to do. This appeal is taken from the action of the court in refusing to sustain said motion, and also on exceptions which the company took to the instructions given by the court to the jury.

I.

The court erred in overruling the motion of the plaintiff in error to instruct the jury to return a verdict for it.

This motion is found upon pages 17 and 18 of the Transcript of Record. An examination of the testimony in this case, an abstract of which is found on pages 14,

15, 16 and part of 17, of the Transcript, will show that there was no proof whatever in this case showing or tending to show when the frog in question became unblocked, or how long it had been unblocked; or that the company had any knowledge, actual or implied, that the frog was unblocked; and no evidence tending to show that the frog in question remained unblocked any length of time, or such a length of time as would charge the company with knowledge of that fact.

The testimony also shows that it was the rule and practice of the company to block the frogs upon all its lines. The testimony in the case with reference to the blocking in the frog in question and its condition at the time, so far as the evidence of the defendant in error is concerned, was the testimony of several witnesses, namely, Messrs. Day, Dodge, Elwood and Sirles, and to the effect that they were at the switch the *next day after the accident*, and that from the examination they then made they did not find any wedge or blocking in the frog. A number of witnesses upon the part of the company, namely, Messrs. Gillis, Miller, Ryan, Ogilire, Dunn, Williams and Amsberry, all testified that they were there the next morning, and that the frog in question was blocked. The defendant in error offered no testimony in the case showing the condition of the frog prior to the time of the accident, and, except his own evidence, not a word of testimony as to the condition of the frog, as to being blocked or unblocked at the time of the accident.

One ground of the motion filed by the company requesting the court to instruct the jury to return a verdict for it was the failure of the defendant in error to show knowledge of the company as to the unblocked condition of the frog, or that it had been unblocked such a length of time as to charge the company with the knowledge of its condition. How long had this frog been unblocked? Had it been unblocked such a length of time

as that the company should have known or by the exercise of ordinary care could have known its unblocked condition? Was the frog unblocked because of the negligence of the company? The record on all these questions is silent, and there is no testimony thereon, except that introduced on the part of the company. The witnesses on the part of the plaintiff testified as to the condition of the frog after the accident, and none of them saw it until the following morning. The only evidence on the question at all as to the condition of the frog before the accident was that of the witness Gillis, called by the company, who testified that the frog was blocked before the accident, and that he had put the block in himself, and this evidence is nowhere and by no one denied or controverted.

The rule is well settled that if an injury arises from a defect or insufficiency of machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same through his own negligence and want of proper care. In other words, it must be shown that he either knew, or ought to have known, of the defects which caused the injury.

Wood on Master and Servants, secs. 366 and 368, pages 743 and 744;

Thompson on Negligence, vol. II, pages 993 and 1053, section 48;

Pierce on Railroads, sections 373 and 382;

Humphrey *v.* R. R. Co., 39 A. and E. R. R. Cases, 363;

Hudson *v.* R. R. Co., 41 A. and E. R. R. Cases, 348;

Baldwin *v.* Ry. Co., 68 Ia., 42;

Griffiths *v.* R. R. Co., 72 Ia., 646;

R. R. Co. *v.* Troesch, 68 Ill., 545;

R. R. Co. *v.* Platt, 89 Ill., 141;
R. R. Co. *v.* Hightower, 92 Ill., 139;
R. R. Co. *v.* Stites, 20 Bradwell, 648;
Wright *v.* R. R. Co. 25 N. Y., 566;
Kidwell *v.* Ry. Co., 3 Woods (U. S. C. C.), 313;
R. R. Co. *v.* Wagner, 21 Central Law Journal, 51.

The facts in Griffiths *v.* R. R., *supra*, are similar to those in the case at bar, and the Supreme Court of the State of Iowa reversed the judgment of the court below because the verdict was against the instructions of the court. We quote from the opinion in that case:

"There is not a single witness who testified that he observed the condition of the block until after the accident. There is therefore no evidence tending to show how long it existed, or that the defendant or any of its officers or employés had knowledge that the block was in any respect defective. If the question as to negligently furnishing the block had been submitted to the jury in the instructions under consideration, and the jury had followed the instructions as to notice and knowledge of the defects, their verdict should have been for the defendant. There was no evidence authorizing recovery, and the court should have so directed the jury, as the defendant asks it to do."

"In an action by an employé against his employer for injuries sustained by the former in the course of his employment, from defective appliances, the presumption is that the appliances were not defective; and when it is shown that they were, there is a further presumption that the employer had no notice or knowledge of the fact, and was not negligently ignorant of it."

Thompson on Negligence, *supra*.

In the case of Railroad Company *v.* Wagner, *supra*, the Supreme Court of Kansas says:

"It will be presumed, in the absence of anything to the contrary, that the railroad company performs its duties in such cases, and the burden of proving otherwise

will rest upon the party asserting that the railroad company has not performed its duty. And where an employé seeks to recover damages for injuries resulting from insufficiency of any of the machinery or instrumentalities furnished by the railroad company, it will not only devolve upon such employé to prove such insufficiency, but it will also devolve upon him to show either that the railroad company had notice of the defects, imperfections or insufficiencies complained of, or that by the exercise of reasonable and ordinary care and diligence it might have obtained such notice. And proof of a single defective or imperfect operation of any of such machinery or instrumentalities resulting in injury will not of itself be sufficient evidence, nor any evidence, that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such machinery or instrumentalities."

Negligence can not be presumed. The presumption is that the company had no notice that the frog in question was not blocked. The burden was upon the plaintiff below to show that the company had notice that it was not blocked. The contention that, because it was not blocked at the time of the accident, the jury could infer that it never had been blocked, is not tenable. Proof of the defect is not proof of knowledge or notice. The learned judge below, in the opinion which he filed at the time of the order overruling the motion for new trial in this case, says (page 28, transcript of record), that the counsel for plaintiff in error relied in argument to the jury upon the fact that the frog never had been blocked. We confess our inability to see what that has to do with the points here raised. The only question that was really left for counsel for plaintiff in error to argue to the jury was the question as to whether or not the frog was blocked. The question as to whether or not the company had any notice, and the claim that there was no evidence in the case showing the condition of the frog before the accident, were fully argued and

presented on the motion filed by the company for a verdict. And this motion the court overruled. The principal point then to be urged by the counsel for the company, and upon which they relied, was that the frog was blocked at the time of the accident, and that James received his injury from stumbling or tripping or in some other way. The absence of any testimony as to the condition of the frog prior to the accident and the failure of the defendant in error to establish any negligent act of the company, which proximately caused the injury to James, were all presented in the motion for a verdict, and all that was left as a matter of fact to go to the jury was as to whether or not the frog was blocked.

II.

The court erred in giving to the jury certain instructions, which were excepted to by plaintiff in error at the time.

The first instruction excepted to (found in the middle of page 19 of the transcript of record), was as follows:

"Thus you are narrowed on this issue to the question: was the frog blocked or was it not blocked, at the time of the injury?"

And as connected therewith the instruction found at the bottom of page 20 and top of page 21 of transcript, which was as follows:

"Was the frog blocked at the time of the injury? If the frog was blocked at the time of the injury, the plaintiff has not proven his case, as the pleadings make it herein, and the defendant is entitled to your verdict. The defendant is not required to prove that the frog was blocked. The burden is upon the plaintiff and he must prove that it was unblocked. Before the plaintiff can have your verdict upon that point, he must sustain the burden of proof and show that the frog was not blocked at the time of the injury."

In these instructions the court submitted to the jury the single question, namely, was the frog blocked or was it not blocked at the time of the injury, and in fact told the jury that if the plaintiff below had sustained the burden of the proof in showing that the frog was unblocked, then he was entitled to a verdict. We certainly think that this was not the law and was error. This was only *one* of the questions that should have been submitted to the jury. If the jury should have found that the frog was not blocked at the time of the accident, that would not entitle the plaintiff below to recover. There were other and important questions which the court should have submitted to the jury for their determination, and which they would have had to have found in favor of the plaintiff below before he would have been entitled to recover. In addition to the question as to whether the frog was blocked at the time or not, the court should have called upon them to determine whether the frog was not blocked on account of the negligence of the company. *Non constat* but what the block was torn out of the frog in question by a train which had gone over this identical switch an hour before or possibly by the same train about which James was switching. How long had the frog been unblocked? Did the company have knowledge, actual or implied, that the frog was unblocked? Was an unblocked frog unsuitable or unsafe?

Proof on every one of these questions should have been adduced, and if the court was unable to find any in the record, it certainly was its duty to have sustained the motion to direct a verdict.

III.

There was no proof whatever in this case that an unblocked frog was unsuitable or unsafe. All the testimony

in the case is that of Mr. O'Keefe, who says that an unblocked frog is "safer." This is not sufficient to entitle any one injured by an unblocked frog to recover.

See—

R. R. Co. *v.* Lonergan, 118 Ill., 51;
R. R. Co. *v.* Louis, 24 Neb., 871;
McGinnis *v.* R. R. Co., 49 Mich., 472.

IV.

The next instructions complained of, and to which proper exceptions were taken, are found on pages 19 and 20 of the transcript, and are as follows:

"Now, if the defendant had the frog originally well blocked and put in good condition, and if it is shown that the frog became unblocked in such a way as that the company would not be negligent because of it, the plaintiff can not recover in this case.

"To illustrate further: If evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at the time so near the injury, as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen or otherwise, before the injury, then in an accident of that kind, the company would not be liable for the injury to plaintiff, because the company would not have been negligent in not ascertaining that the frog had been thus removed.

"That is, if the frog had been originally well blocked, and had, by some sudden accident, become unblocked, and an accident occurred, as that to the plaintiff, immediately after the unblocking of the frog, or so near to the time as that the company ought not in the exercise of reasonable care on this point, to have found out and discovered before the injury that it had become unblocked, then the company, in such a case, as you will see, would not be negligent, and therefore would not be responsible if plaintiff was injured by such a frog.

This would be a pure accident and included within the risk and hazard he assumed in his contract of employment.

"But if, on the other hand, in the case I have given you, the company, after this sudden unblocking of the frog, had permitted it to remain unblocked for such a length of time as that the company, exercising ordinary care, ought to have discovered its unblocked condition by inspection, or otherwise, then you see the company would have been negligent, and if plaintiff was injured at that frog because of its being thus negligently left unblocked, he would be entitled to recover. But there is nothing in this case to show that there was any sudden unblocking of the frog. I have simply given this as an illustration tending to illustrate how negligence of the company might arise in such a case. The evidence does not bring it into this case.

"I will give another illustration, which may perhaps assist you in reaching a conclusion as to the truth in this matter. Under some circumstances it might be that the wearing away of the surface of the block would be such as that the company would become negligent in not ascertaining the wearing away of the block, and the dangerous condition into which the frog had come from such wearing, and in not replacing it in proper time with an unworn block.

"But in this suit which you are now trying, nothing of that kind is in issue; there is no allegation in the petition that the blocking of the frog had become worn so as to be dangerous, so you will not consider that element whether the block had become worn or not, which otherwise might have been in this case.

"There is no claim before you, and you will not consider whether, by wear upon the block, it might have become dangerous, so that the company by allowing it to remain in that condition was negligent."

Our objections to these instructions are that they were not warranted either by the pleadings or the testimony. The theory upon which the court submitted this case to the jury was that all the plaintiff below had to do in order to recover was to prove that the frog was unblocked at the time of the accident. In his own language to the

jury, he "narrowed the issues" down to this single question. The only negligent act charged in the petition was that the company had failed to block or fill the frog in question. No claim in the petition that the frog had been blocked and that the company had permitted it to become worn so that it was in an imperfect condition. No claim in the petition that the blocking was insufficient. The only averment in the petition is (and the case was tried solely upon this theory) that the frog in question *never had been blocked*. We submit that the court was not warranted, either by the pleadings or the evidence, in giving these instructions to the jury. The instructions must be confined to the pleadings and the evidence. If the frog was unblocked at the time of the accident, and that was negligence, then the propositions and the law with reference to this question were very simple and could have been easily submitted to the jury. If such a state of facts was negligence sufficient to entitle the plaintiff below to recover, without any further proof, then the merest statement of that to the jury would have been sufficient. But the court submitted to the jury, and as he phrased it, to "aid" them in determining the question of the negligence of the company, facts and circumstances which were not in issue, and in support of which there was no testimony.

It is now settled beyond cavil or dispute that instructions must be confined to the pleadings and the evidence, and it is error to submit questions to the jury upon which there is no evidence, and it is also equally erroneous to submit questions which are not presented by the pleadings.

See—

Witchett *v.* Ry. Co., 67 Iowa, 15;
Stein *v.* Seaton, 51 Iowa, 18;
Cressy *v.* Postville, 59 Iowa, 62;
Trougher *v.* Coal, Co., 62 Iowa, 576;
Wood *v.* R. R. Co., 68 Iowa, 191.

The court in these instructions proceeds to tell the jury by way of illustration how the blocking in the frog might suddenly by some disarrangement of the machinery have been pulled out; also, that the frog might have been originally well blocked and have become by some accident unblocked; also, that it might have become suddenly unblocked and the company permitted it to remain unblocked for such a length of time as to charge it with knowledge of the fact; also, that it might originally have been a good blocking but had become worn so as to be dangerous. These were given to the jury as illustrations to aid them in arriving at the simple question as to whether or not the frog had ever been blocked. These instructions were certainly misleading. Nowhere does the court put any restrictions or limitations upon these instructions. Nowhere in the instructions did the court explain these matters to the jury so as that they could possibily know what the illustrations were given to them for, unless it was to show that the company would be liable. The jury evidently supposed that the court in giving these illustrations to them intended to convey the idea that it would have been an easy matter for the company to have shown the state of facts embodied in the instructions and thus excuse itself from negligence and liability. An insufficient block, a worn out block, a defective block, was not in the case. Illustrations relative to how a frog once blocked might become insufficient, or how a blocking might become worn and imperfect, could not possibly have aided the jury in determining the question as to whether or not the frog in fact was blocked. The court said that if the frog had been blocked and then became suddenly unblocked and so near the time of the accident as that the company in the exercise of reasonable care could not have discovered it, then it would not be negligence and the plaintiff could not recover, "But if, on the other

hand," says the court, "in the case I have given you, the company, after this sudden unblocking of the frog, had permitted it to remain unblocked for such a length of time as that the company, exercising ordinary care, ought to have discovered its unblocked condition by inspection or otherwise, then you see the company would have been negligent, and if plaintiff was injured at that frog because of its being thus negligently left unblocked, he would be entitled to recover. *But there is nothing in this case to show that there was any sudden unblocking of the frog.*" Who was to show this? James or the company? Of course, if any such claim had been made in the petition and if there had been any evidence about "sudden unblocking," then the court would have been in law and duty bound to tell the jury that the burden was on the plaintiff below to show all these facts, and especially notice to the company. It is true that the judge after submitting these illustrations took the one with reference to the fact that the blocking had become worn, back from them and stated that it was not in the case, but he failed to tell the jury whether it was the duty of either James or the company to show these facts. The phraseology, the trend of these instructions was to the effect that the company should have shown this state of affairs and thus excused itself. After giving these illustrations to the jury the judge then said that there was nothing in the pleadings or the testimony with reference to the block becoming worn or dangerous, and that they were not trying that issue. He did not, however, tell the jury that the sudden unblocking of the frog and allowing it to remain unblocked such a length of time as would charge the company with negligence *was withdrawn from their consideration.* The jury was told in these instructions that if this frog had become suddenly unblocked and had remained unblocked for such a length of time as that the company exercising

ordinary care ought to have discovered its unblocked condition, and it did not, and plaintiff below was injured at that frog, he was entitled to recover. There was not a word or lisp of testimony of this character, and not a single line in the petition which could be construed into an allegation of negligence of this kind.

In the latter part of these instructions, page 20 of the transcript, the court says, "And you will not consider whether by wear upon the block, it might have become dangerous." In that part of the instruction with reference to the "sudden unblocking," the learned judge says: "But there is nothing in this case to show that there was any sudden unblocking of the frog." Whose fault was it that there was no showing in this regard? The jury could have inferred that it was as much the blame of the company as it was of James. They were not informed as to whose duty it was to show that it had become suddenly unblocked. If the learned judge should have fully and explicitly defined the relative rights and duties of the company and James with reference to such a state of facts, had it been in the case, he would have instructed them that if this was a claim of negligence, it was the duty of the plaintiff below to show how the frog became unblocked and the length of time it had remained unblocked. We insist that instead of these instructions and illustration having a tendency to "illustrate how negligence of the company might arise in such case," or to assist the jury in "reaching a conclusion as to the truth of the matter," they only tended to confuse and mislead them. Instead of instructing the jury fully upon the questions which really were in the case, and to which the attention of this court has heretofore been called, the court went outside of the record and submitted to them questions which were not in the pleadings or in the evidence, and which belonged to the realm of conjecture and speculation. The court refused to take the case

away from the jury because of the want of notice and because of the absence of any testimony whatever as to how long the frog had been unblocked, and yet instructed the jury upon these questions when there was nothing in the pleadings or record relative thereto. The learned judge having determined to submit the case to the jury upon the one single question as to whether or not the frog was unblocked, this question should have been left directly to them without any misleading instructions, suggestions or illustrations.

We confidently submit that the court erred in overruling our motion for a verdict and also erred in giving the instructions which have been commented upon in this brief, and we therefore ask that the judgment of the court below be reversed, with proper instructions from this court as to the disposition of this case.

Respectfully submitted,

JOHN F. DILLON and
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

APR 30 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1895.

No. 270.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

GRANVILLE J. JAMES,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

MICHAEL J. COLBERT,
of Counsel.

FRANCIS A. BROGAN,
Att'y for Defendant in Error.

BURKLEY PRINTING CO., OMAHA

IN THE

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THE UNION PACIFIC RAILWAY COMPANY,
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GRANVILLE J. JAMES,
Defendant in Error.

No. 15,389

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

In this case the defendant in error prosecuted an action in the Circuit Court of the United States, for the Southern District of Iowa, against the Union Pacific Railway Company, a corporation organized under the laws of the United States, for damages claimed to have been sustained by him through the negligence of the railway com-

pany while he was engaged in the performance of his duties as a brakeman on a freight train of the company. The negligence alleged is that it was the duty of the company to block the switch frogs for the purpose of preventing accident, and that the company in recognition of this duty did generally block the frogs, and that when he entered upon the employment, he was informed by his employer that the switch frogs were blocked; but that the company had negligently omitted to block the switch frog at the place where the accident occurred, and that during the night time, and while he was engaged in the performance of his duties, his foot became fastened in the unblocked switch frog, whereby he suffered the loss of his leg. The defendant in the court below entered a general denial of the negligence alleged, and pleaded contributory negligence. This latter plea was abandoned on the trial, no evidence being introduced in support of it.

Upon the trial, the plaintiff offered evidence to substantiate the averments of his petition. No exceptions have been reserved to the conduct of the trial or to the reception or rejection of evidence. It is quite apparent that the attorney for the railway company well conceived that there was but one serious question in this case, and that was whether the allegation of the plaintiff that the negligence existed could be sustained by the proof. There was a sharp conflict of testimony on this point, but that has been wholly disposed of by the verdict of the jury, and is not now before this court. The plaintiff recovered a verdict of $7,500, upon which the trial court rendered judgment, overruling the motion of the railway company for a new trial. The railway

company sued out a writ of error from the Court of Appeals of the Eighth Circuit, where the decision of the circuit court was affirmed; see the opinion, 12 U. S. Appeals, 482. The railway company has now prosecuted error to this court to reverse the decision of the circuit court of appeals.

In discussing the questions urged in this court, it will be convenient to consider the several assignments of error in their order.

The first and second assignments are general and formal, and need not be separately discussed.

I.

The third assignment of error complains of the overruling of the company's motion for an order to direct a verdict for the defendant in the lower court. This assignment is probably predicated upon the fact that the court refused to give the following instruction for the railroad company at the close of the trial:

"The testimony in this case, so far as the plaintiff is concerned, is conflicting as to the question of blocking. Three witnesses only have testified that the frog in question was not blocked, and another witness for the plaintiff has testified that the frog was blocked, but that the blocking, by reason of being worn, was insufficient. Upon the part of the defendant the proof is strong, and conclusive, that the frog in question was blocked. Seven witnesses, upon the part of the defendant, have testified that the frog in question was blocked at the time this accident occurred. The opportunities for the defendant's witnesses to know the condition of the blocking were good, the examinations were careful

and made at the time. With this testimony so preponderating upon the part of the defendant, as to the distinct charge of negligence in this case, it becomes the duty of this court to decide whether the plaintiff has introduced sufficient evidence to support or justify a verdict in his favor. Conceding to all the evidence offered by the plaintiff, its greatest probative force, in the judgment of the court it is not sufficient to overcome the strong preponderating evidence offered upon the part of the defendant. If a verdict should be rendered in this case for the plaintiff, it would become the duty of the court, in a conscientious discharge thereof, to set aside the verdict, and, this being so, there is no necessity of submitting the case to the jury and awaiting its determination. Because, therefore, of the failnre upon the part of the plaintiff to support his charge of negligence by preponderating testimony, and because of the fact that the testimony offered by the defendant abundantly overcomes the slight proof made by the plaintiff, your verdict must be for the defendant and I instruct you accordingly to return one therefor."

It seems wholly unnecessary to discuss this question. It will not be seriously contended that there is any rule of law to the effect that when three competent witnesses testify for the plaintiff and seven testify on the same point for the defendant, even assuming that to be a correct statement of what took place on the trial, the court should, as a matter of law, direct a verdict for the defendant. As the learned judge of the circuit court of appeals rightly says: "If the trial court had withdrawn that issue from the jury on the theory outlined in the instruction or on any other theory, it would have invaded the province of the jury, and its action would have been clearly indefensible."

II.

The fourth assignment of error is an attempt to raise the only question in the case which is entitled to serious consideration. Before entering upon the discussion of it, it might be well to inquire whether the record raises the question attempted to be presented. It is contended by the railroad company that the plaintiff below, as a part of his case, should have shown that the company had notice of the absence of the blocking or that the circumstances were such that the company should have taken notice of it or could have obtained notice or knowledge by a reasonable examination, and it is contended that there was no such proof. For that reason the railroad company at the close of the trial requested a peremptory instruction for the defendant on account of what it claimed to be a total failure of proof upon an essential element of the case. But even if it be a correct rule of law that notice of the defect in question is necessary in order to charge the master with liability, this instruction set forth in assignment No. 4 should have been overruled because it undertook to have the question of notice disposed of by the court, whereas there was in the record sufficient evidence to have required the question of notice to have been submitted to the jury, even if notice was necessary. On page 13 of the printed record in this court, the witness, A. S. Day, testifies that not only was there no blocking in the frog when he went there early in the morning to examine it, but there was no blocking or pieces of blocking near it; and the witness, Gillis, called by the railroad company, testifies on page 14 of the printed record in this court, that the blocking in the frogs may get out of

place by being taken out by the workmen when the tracks are changed, but when that is not done, then the ordinary way in which blocks would get out is by being torn or cut loose by the flange of the wheel, and in that case, the pieces of the blocking would be found remaining between the rails. A defect of this kind is patent and obvious. If blocking be missing from the place where it ought to be, the section men in their daily trips over the tracks could recognize it at a glance, and discover its absence within a few hours. If, therefore, it is to be construed to be a case where notice, actual or constructive, must be shown, then there was sufficient evidence in the case to have required the jury to pass upon the question of constructive notice, and therefore in any view, the peremptory instruction set forth in assignment No. 4 should have been refused.

But an instruction that the jury should find for the defendant, unless it found that the company had notice that the frog was not blocked, would not have stated the law correctly in this case. The plaintiff alleged in his petition in effect that the company had never blocked this particular frog, and his evidence tended to sustain that allegation, while the evidence of the railroad company did not tend to show that the frog had at one time been properly blocked, and that if it were not blocked at the time of the accident, it was due to some recent change in its condition. On the contrary, the defendant purposely limited its testimony and attempted to show that the frog was blocked at the time of the injury, thereby claiming to prove that the plaintiff was not injured in the manner he alleged. In the instruction set forth in assignment No. 4, the counsel for the railroad com-

pany construed the issues made by the pleadings exactly as we do now, that is, he adopted the theory that the case of the plaintiff was based on a structural defect, that is, a defect in the original construction, and that the plaintiff must prove that precise allegation before he could recover. This construction of the issues was accepted by plaintiff's counsel and by the court, and is a fair construction to place upon the pleadings.

Now if the plaintiff's claim as shown by the pleadings, and the evidence which he offered, was based upon a structural defect, that is, upon the failure of the master to fulfill the original duty which rested upon him to furnish in the first instance safe and suitable appliances and a safe place in which to work, then there could be no question of notice in the case. The duty resting upon the master to furnish safe appliances and a safe place in which to work is an absolute one. It is one from which he cannot escape by delegating to a subordinate. He cannot escape liability for the failure to perform it, upon the ground that the failure was due to the negligence of a fellow servant of the plaintiff; neither can he suggest as a defense that he had no notice of his own failure to perform his duty. Every responsible person is presumed to know what he has done, and what he has omitted to do. To attempt to inject the question of notice into this case involves a confusion of the reason for the rule of notice in other cases where it is properly applied. Where a master has properly complied with his original duty to furnish safe appliances, and these appliances have become defective through causes arising after they were properly furnished in the first place, the master is not liable unless he has notice of

the defect, or unless, by the use of reasonable diligence, he would have obtained notice. But the notice in such a case is not the basis of the liability of the master; it is rather the basis of his duty.

When it is found or conceded that the duty exists and has not been performed, there can be no question of notice to the master of an unfilled duty in order to hold him liable.

This precise question has been considered by the courts of last resort in many of our states, and it would seem that the cases hereinafter cited should effectually dispose of the contention of the railroad company that the plaintiff below was required to prove notice of the omission to block this frog.

Greenleaf v. Ill. Cent. Ry. Co., 129 Ia. 14, opinion page 46.

Chicago & E. I. R. R. Co. v. Hines, 132 Ill. 161.

Crown Coal Co. v. Hiles, 43 Ill. App. 310.

Branch v. Port Royal R. R. Co., 35 S. C. 405.

Ocean S. S. Co. v. Mathews, 86 G. A. 422.

Morton v. R. R. Co., 81 Mich. 433.

Griffin v. Boston & Albany Ry. Co., 148 Mass. 143.

Mooney v. C. R. L. Co., 154 Mass. 407.

Village of Jefferson v. Chapman; 127 Ill. 438.

Gibson v. Ry. Co., 46 Mo. 163.

Jager v. California Bridge Co., 104 Cal. 542.

Louisville A. & C. Ry. Co. v. Berkey, 136 Ind. 181.

Standard Oil Co. v. Bowker (Ind. '95), 40 N. E. Rep. 128.

Salem S. & L. Co. v. Griffen, 139 Ind. 141.

M. R. & C. R. R. Co. v. Barber, 5 Oh. St. 541.

Brooke v. C. R. I. & P. Ry. Co., 81 Ia. 504.

L. & N. Co. v. Colton, 86 Ala. 129.

Ford v. Fitchburg R. R. Co., 110 Mass. 240.

Hough v. Ry. Co., 100 U. S. 213.

Northern Pac. Ry. Co. v. Herbert, 116 U. S. 642, 650.

Shearman & Redfield on Negligence, S. 214, 4th Ed.

"It is also clear that the defect might of itself indicate that tae master should have known of it. Its patent and obvious character and the apparent age of the defect might indicate this."

Ocean S. S. Co. v. Mathews; supra.

"The dangerous agencies were not in the ill repair or falling into decay of the structures, but were in the negligent construction, a fact necessarily known and charged to the knowledge of the master."

Salem S. & L. Co. v. Griffin; supra.

"The condition of the draw-head was not due to use or negligent repairing, but to improper and defective construction. The company fully recognized the defect, and were altering and improving the cars thus constructed."

Gibson v. Ry. Co.; supra.

"The servant does not undertake to incur the risks arising from want of sufficient and skilled co-labors, of from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters, his employer will make adequate provision that no danger will ensue to him."

Northern Pac. Ry. Co. v. Herbert: supra.

"It is fundamental in the law of personal liability for the consequences of action or non-action that the law charges the individual with a knowledge of his duty. Hence, when it is alleged that it was the duty of an individual or corporation to do or to not to do a given thing, it is necessarily implied from that allegation that the individual or corporation knew that it was its duty to do or not to do a given thing. So also, all accountable persons know what they do or do not do; and it is obviously no more necessary to allege that a corporation knows what it has done or has not done, than it is to allege the same with regard to an individual, for the acts or non-acts of the servants of the corporation within the sphere of their duty are its acts or non-acts. Filling in the spaces between the ties of defendant's railroad 'with cinders or some other substance,' is an affirmative act. Accepting as we must from the allegation that it was the duty of the defendant to this affirmative act, its omission was palpably a failure of duty in construction, for which it is liable to the plaintiff."

Chicago & E. I. R. R. v. Hines; supra.

"Even if the appliance was originally a proper and suitable one, still at the time of the accident it was not in the same condition as when first constructed. The evidence plainly indicates that the headblock had become loosened at one end, and whatever efficacy may have arisen from the original bolting thereof, was gone at the moment of the accident. Under these circumstances, the original bolting goes for naught, and the case stands exactly as though one end of the appliance had never been fastened. If it had been constructed in this manner in the first instances, there can be no question but that such construction would have been defective, and that the defendant would have been guilty of a lack in the exercise of the most ordinary care in such construction. The rule is elementary that the same duty devolves

upon the master in subsequently maintaining the appliance in a safe and suitable condition as rested upon him when it was originally furnished to his servant."

Jager v. California Bridge Co.; supra.

"Defendant's counsel asked the Court to instruct the jury that it was essential to the plaintiff's recovery that he should allege and prove that the defendant had notice or knowledge of the defect complained of, or that it was guilty of negligence in not having such notice or knowledge, and that having failed to either allege or prove such facts, the plaintiff could not recover. This the court declined to do, and we think properly. As the case was left to the jury, there was no room for the application of the rule requiring notice. The court limited the jury in determining the question of defendant's negligence to one point, viz; whether the chain was reasonably safe when it was put on the car, and distinctly told them that if they found it was then safe, the plaintiff could not recover; * * * * if he had left the jury to determine whether the chain had not become unsafe by time and wear, then the question of the defendant's notice or knowledge might have been important."

Morton v. Ry. Co.; supra.

"If the defects which caused the injury was actually unknown, either to the company or the conductor, and not discoverable by due and ordinary inspection, and yet were such as resulted from a neglect of resonable and ordinary diligence and care on the part of the company either in procuring the cars or machinery to be made, or in continuing their use on the road beyond the time when they could be safely used, the company would be liable."

M. R. & L. E. R. R. Co. v. Barber; supra

"If this car was wanting in the appliances referred to by the plaintiff at the time of its construction, it would not

be necessary to show notice or knowledge thereof on defendant's part in order to fix liability. If, however, it was at one time safe and convenient, that is, had all the conveniences reasonably necessary for the safety of employes, and they were removed by accident or otherwise, then it should be shown that defendant either had notice thereof or ought to have had by use of ordinary care, before an employe can claim liability on account of such defect."

Greenleaf v. Ill. Cen. R. R. Co.; supra.

"Here no latent defect was involved. The defect, if there was one, was patent, and not only was discoverable by the exercise of ordinary care, but could not have escaped the observation of a merely casual looker-on. The plaintiff in error contended that the condition of the implement was not defective, but did not contend that the condition, whatever it was, whether defective or not defective, was not perfectly obvious. The defect was obvious to the eye, if not to the mind of the master. Once prove the contested fact which the court required the plaintiff to show that the condition was defective, it could not be denied that it was patent."

Ocean S. S. Co. v. Matthews; supra.

III.

The fifth, sixth and seventh assignments of error may properly be discussed together. It is claimed in them that some of the court's instructions were misleading and tended to direct the attention of the jury to issues not in the case. An examination of the entire instructions, however, will satisfy the court that so far from directing the attention of the jury to issues not in the case, the instructions complained of were designed by the trial court and necessarily would tend to withdraw from the consideration of the jury the issues that

were not in the case. Premising that this court will not consider an instruction complained of separately and without its consent but will consider the entire instructions as a whole, it appears that on the close of the trial it was contended by the railroad company that the plaintiff must recover, if at all, upon the distinct charge of negligence contained in his petition, that is, he must show that the frog never had been blocked, and he could not recover if the jury should find that the frog had once been well blocked but became unblocked suddenly by some accident, or had become gradually out of condition by wearing away. The plaintiff below did not insist upon any greater lattitude in the construction of the issues, and was willing to rest the case upon the proposition that the frog never had been blocked. The court accepted this construction of the issues, and dealt with the case accordingly. The court, upon this theory, proceeded to instruct the jury that they could not find for the plaintiff upon any other claim of negligence than the one charged in the petition that the frog had been left unlocked, and that the plaintiff had caught his foot in it, and furthermore that even if the frog was not blocked at the time of the accident, the plaintiff could not recover upon any theory that it had once been blocked, and had been allowed to become and remain unblocked through some accident or on account of wearing away. For the purpose of excluding from the consideration of the jury any other possible negligence in the case, such as the wrongful moving of the train at the time, or the wrongful sending of the plaintiff in between the cars at that time and place without the use of safety couplers, the court proceeded to tell the jury, as set forth in the fifth assignment of error, "You are narrowed on

this issue to the question, was the frog blocked or was it not blocked at the time of the injury." Now the court did not proceed to say that if the frog was not blocked, the plaintiff would therefore recover. By referring to the entire instructions, beginning on p. 18 of the printed record, it will appear that the court followed the statement cited in assignment No. 5 by telling the jury that they must consider all the testimony on the question of whether the frog was blocked, and "if the frog was blocked at the time of the accident, then, under the claim made in the petition of plaintiff, he cannot recover."

It might be sufficient to dispose of assignment No. 6 by saying that the railway company excepted to a number of different propositions as a whole, and if any one of them be sound, the exception will not avail the company.

The exception set forth in assignment No. 6 contains a number of distinct propositions which certainly state the law correctly, and which were quite favorable to the railway company.

But even assuming that this court would consider separate parts of that exception, yet there is nothing contained in the entire paragraph that will be deemed prejudicial to the railway company. The court merely tells the jury that there are possible cases in the abstract where a railroad company may be liable, although it has originally performed its duty of furnishing a safe appliance, if afterwards the appliance becomes unsafe, and the railway company negligently allows it to remain so, but the jury is distinctly told that they must not find for the plaintiff in this case upon any such theory, but must confine themselves strictly to the issue made by the

pleading, that is, that the frog had never been blocked. Unless some distorted or forced meaning is given to the language of the court, and it is not to be assumed that the jury would give such a forced meaning to it, the only conclusion which could be drawn from this instruction is that it excluded from the consideration of the jury the issues that were not in the case.

The seventh assignment of error is quite similar to the fifth, and contains a mere repetition of the warning contained in the instruction quoted in the fifth assignment, that is, the court again tells the jury that they cannot find for the plaintiff unless they first find that the frog was not blocked.

Rogers v. The Marshall, 1 Wall., 644.

Cummings v. Chandler, 26 Me. 453, 458.

Schneider v. Hosier, 21 O. St., 98, 113.

Ocheltree v. Carl, 23 Iowa, 394.

"Where the instruction is sufficiently intelligible, a reversal will not be ordered in the indulgence of a nice criticism," *Rogers v. The Marshall, supra.*

IV.

The eighth assignment of error asserts that the circuit court of appeals erred in holding that the defect in question was structural. It would be more fair to say that the circuit court of appeals did not undertake to say whether the defect was structural or not, but a record came before the circuit court of appeals, in which the plaintiff had pleaded a structural defect, and had offered evidence tending to establish the charges in his petition, and the plaintiff in error in that court had complained of the refusal of the trial court to give an in-

struction which does assume that the defeat was structural, and undertook to lay down a proposition of law that the master must have notice of a structural defect, and the circuit court of appeals announced that such an instruction upon such an assumption of the issues was rightly refused. But even if the circuit court of appeals had undertaken to hold that the defect was structural it is quite clear that its holding would be correct.

It must be noted that there is no question in this case now raised by the record whether it was the duty of the railroad company to furnish the safety appliances referred to in the pleadings. There have been numerous decisions on the question whether the railroad company is obliged to use wooden blocking between its switch frogs for the safety of its employes. The question has seemed to turn generally on whether the railroad company has assumed the duty of so providing for their safety. If the company has undertaken to operate its road without the use of switch blocks, an employe who is injured by reason of it cannot complain, but it would seem to be quite clear that in this case, where the railroad company has assumed to block all its switch frogs, and has in fact blocked most of them, and has assured its employes that they are all blocked, then it has an undoubted duty in the premises, the omission of which renders it liable. If, therfore, it was the duty of the company to block this particular frog, its omission to perform that duty was as we have already pointed out, a failure to compiy with the original duty imposed upon a master by the contract of employment to furnish its servants with safe appliances, and a safe place in which to work. It is therefore quite correct to say that the

defect in a track arising from the omission to put blocks between the switch frogs is a structural defect.

The ninth assignment of error in no manner correctly states the decision of the circuit court of appeals. There is no such holding in the opinion of the circuit court of appeals, and the decision was not based upon any such theory as that set forth in assignment No. 9.

The decision of the circuit court of appeals is right and should be affirmed.

FRANCIS A. BROGAN,

Attorney for Defendant in Error.

Michael J. Colbert,
Attorney for Defendant in error.